o. 84-194-CFX
tatus: GRANTED

ocketed:
ugust 2, 1984

Title: United States, Petitioner
v.
Louise Shearer, Individually and as Administratrix
for the Estate of Vernon Shearer, Deceased

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Cannon, William T.

ntry	Date	Note	Proceedings and Orders
1	May 24 1984		Application for extension of time to file petition and order granting same until August 4, 1984 (Brennan, June 4, 1984).
2	Aug 2 1984	G	Petition for writ of certiorari filed.
3	Aug 16 1984		Waiver of right of respondent Louise Shearer, etc. to respond filed.
4	Aug 22 1984		DISTRIBUTED. September 24, 1984
5	Sep 5 1984	F	Response requested.
6	Oct 6 1984		Brief of respondents Louise Shearer, etc. in opposition filed.
7	Oct 10 1984		REDISTRIBUTED. October 26, 1984
8	Oct 18 1984	X	Reply brief of petitioner United States filed.
9	Oct 29 1984		Petition GRANTED.
			**********
11	Dec 10 1984		Order extending time to file brief of petitioner on the merits until December 26, 1984.
12	Dec 11 1984		Joint appendix filed.
13	Dec 26 1984		Brief of petitioner United States filed.
14	Jan 4 1985		SET FOR ARGUMENT. Monday, February 25, 1985. (2nd case.)
16	Jan 11 1985		Record filed.
17	Jan 12 1985		Record filed.
18	Jan 28 1985		CIRCULATED.
19	Jan 28 1985	X	Brief of respondent Louise Shearer, etc. filed.
20	Feb 19 1985	X	Reply brief of petitioner United States filed.
21	Feb 25 1985		ARGUED.

CORRECTED COPY

Supreme Court, U.S.
FILED
AUG 2 198
ALEXANDER L. STEVAS
CLERK

84-194
No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REX E. LEE
Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
DAVID A. STRAUSS
Assistant to the Solicitor General
ANTHONY J. STEINMEYER
ROBERT V. ZENER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

59pp

QUESTIONS PRESENTED

1. Whether the survivor of a serviceman who was murdered by another serviceman, while both were off duty and off base, may sue the government for damages under the Federal Tort Claims Act even though the Act bars "[a]ny claim arising out of assault [or] battery."

2. Whether such a suit, alleging that the negligence of the servicemen's superior officers was responsible for the murder, is precluded by the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), which bars suits by servicemen for alleged torts incident to military service.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	3
Reasons for granting the petition	7
Conclusion	17
Appendix A	1a
Appendix B	24a
Appendix C	31a
Appendix D	33a

TABLE OF AUTHORITIES

Cases:

Brooks v. *United States*, 337 U.S. 49 16

Brown v. *United States*, No. 83-1234 (8th Cir. July 20, 1984) 15, 16

Chappell v. *Wallace*, No. 82-167 (June 13, 1983) 13, 14

Collins v. *United States*, 259 F. Supp. 363 9

Feres v. *United States*, 340 U.S. 135 ..... 4, 5, 7, 13, 14, 15, 16

Gibson v. *United States*, 457 F.2d 1391 13

Gilligan v. *Morgan*, 413 U.S. 1 14

Hatzlachh Supply Co. v. *United States*, 444 U.S. 460 5

Hughes v. *United States*, 662 F.2d 219, aff'g *Hughes* v. *Sullivan*, 514 F. Supp. 667 ..... 6, 8, 9

Johnson v. *United States*, 631 F.2d 34, cert. denied, 451 U.S. 1018 16

Cases—Continued: Page

Kosak v. *United States*, No. 82-618 (Mar. 21, 1984) 9, 12

Muniz v. *United States*, 305 F.2d 285, aff'd, 374 U.S. 150 ..... 12, 13

Naisbitt v. *United States*, 611 F.2d 1350, cert. denied, 449 U.S. 885 ..... 6, 7, 8, 9, 16

Panella v. *United States*, 216 F.2d 622 ... 10, 13

Stencel Aero Engineering Corp. v. *United States*, 431 U.S. 666 ..... 5, 14

United States v. *Brown*, 348 U.S. 110 13

United States v. *Shively*, 345 F.2d 294 .... 6, 8, 9, 16

Wine v. *United States*, 705 F.2d 366 ..... 8, 9

Statutes:

Federal Torts Claims Act:

28 U.S.C. 1346(b) 2, 3, 12

28 U.S.C. 2671 *et seq.* 3

28 U.S.C. 2674 12

28 U.S.C. 2680 2

28 U.S.C. 2680(h) 4, 7, 9, 10, 11

Miscellaneous:

Prosser, *Torts* (4th ed. 1971) 12

Restatement (Second) of Torts (1965) 11, 13

Tort Claims: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary, 76th Cong., 3d Sess. (1940) 12

In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

UNITED STATES OF AMERICA, PETITIONER

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 723 F.2d 1102. The statements on denial of rehearing (App., *infra*, 33a-36a) are reported at 729 F.2d 266. The opinion of the district court (App., *infra*, 24a-29a) is reported at 576 F. Supp. 672.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 31a-32a) was entered on December 19, 1983. A petition for rehearing was denied on March 7, 1984 (App., *infra*, 33a-36a). On June 4, 1984, Justice Brennan ex-

tended the time for filing a petition for a writ of certiorari to August 4, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

28 U.S.C. 1346(b) provides in part:

> Subject to the provisions of [28 U.S.C. 2671-2680], the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2680 provides in part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> * * * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

STATEMENT

1. Respondent is the mother and administratrix of a serviceman, Private Shearer, who was stationed at Fort Bliss, Texas. While Shearer was on authorized leave and off the base, he was kidnapped and murdered by another serviceman, Heard, who was also stationed at Fort Bliss and was also off duty at the time. This crime occurred in Otero County, New Mexico, which is adjacent to Fort Bliss. App., *infra*, 2a-3a; C.A. App. 5a, 22a. Heard was subsequently convicted of murder in a New Mexico state court and sentenced to a term of 15 to 55 years' imprisonment (C.A. App. 16a).

Respondent subsequently brought this action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, seeking damages from the United States. She claimed that the Army's negligent failure to prevent Heard from murdering Shearer was responsible for Shearer's death. Specifically, respondent alleged (C.A. App. 17a-18a; Complaint paras. 40-41):[1]

> 40. The United States Government, acting through its Department of the Army, * * * negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard, or take any action to prevent him from endangering other persons, in spite of the defendant's knowledge of his dangerous and murderous propensities, and further failed to warn other persons that he was at large, and of the danger which he presented.
>
> 41. The United States Government, acting through its Department of the Army, * * * negligently and carelessly failed to then remove Andrew Heard from active military duty, in spite of its knowledge

[1] "Complaint" refers to the Proposed Amended Complaint (C.A. App. 11a-18a). "C.A. App." refers to the Appendix to Appellant's Brief in the court of appeals.

> of his dangerous and murderous propensities, with a reasonable degree of promptness given the great danger potential that he posed to other active duty service members, including [Shearer], none of whom were warned of the dangers posed.

Respondent asserted that in 1977, while Heard was assigned to an Army base in Germany, he was convicted by a German court of manslaughter and sentenced to a four-year prison term. In February 1979, when German authorities granted Heard an early release from that term, the Army promptly removed him from Germany and transferred him to Fort Bliss. By the time Heard killed Shearer, in June 1979, the Army had initiated proceedings to have Heard discharged. C.A. App. 13a-15a.

2. The United States District Court for the Eastern District of Pennsylvania granted summary judgment in favor of the government (App., *infra*, 24a-30a). The district court did not address the government's contention that respondent's claim is barred by 28 U.S.C. 2680(h), the intentional tort exception to the FTCA, which provides in part that the government is not liable for "[a]ny claim arising out of assault [or] battery * * *."[2] See App., *infra*, 29a n.4. Instead, the court held that respondent's claim is precluded by *Feres* v. *United States*, 340 U.S. 135 (1950), which held that a serviceman may not sue the government under the FTCA for alleged torts incident to military service.

The district court stated that under *Feres*, the "question is not whether decedent was engaged in activity incident to military service when he incurred his injuries. Rather, the 'focus . . . is upon when and how the negligent act occurs'" (App., *infra*, 26a (citation and emphasis omitted)). The court reasoned that because respondent "allege[d] that the Army was negligent in failing to exert reasonable control over" Heard, respondent's claims "relate directly to decisions of military personnel made in the course of the performance of their military duty and, therefore, are barred by *Feres*" (*ibid.*). The district court also noted that respondent is entitled to receive veterans' benefits (*id.* at 29a) and explained that "the existence of a no fault compensation scheme" for servicemen, veterans, and their survivors is another reason to apply the *Feres* doctrine (App., *infra*, 28a-29a, citing *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977), and *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 464-465 (1980)).

3. A divided panel of the court of appeals reversed (App., *infra*, 1a-23a). The majority overturned the district court's ruling that *Feres* bars respondent's claim, explaining that "[g]enerally, an off-duty serviceman not on the military base and not engaged in military activity at the time of injury, can recover under FTCA" (App., *infra*, 5a-6a) and that "being kidnapped off base at gun point can never be perceived as one of the activities or anticipated * * * benefits of being in the armed services" (*id.* at 7a (emphasis omitted)).

The court also held that the intentional tort exception to the FTCA does not bar respondent's claim. The majority noted that respondent's complaint alleged that the government was negligent and reasoned that "if an assault and battery occurred as a 'natural result' of the government's failure to exercise due care, the assault and battery may be deemed to have its roots in negligence and therefore it is within the scope of the FTCA" (App., *infra*, 8a).

Judge Garth dissented (App., *infra*, 10a-23a). He noted his disagreement with the majority on the *Feres*

---

[2] A proviso to the intentional tort exception specifies that the government can be sued for assault, battery, and certain other intentional torts committed by "investigative or law enforcement officers." There is no suggestion that any of the government employees whose actions are at issue in this case were investigative or law enforcement officers.

issue (App., *infra*, 11a & n.1) but principally discussed the intentional tort exception. Judge Garth noted that Section 2680(h) applies to claims "arising out of" assault or battery and not just claims "for" assault or battery (see App., *infra*, 13a-14a) and accordingly, by its terms, precludes respondent's claim. Judge Garth also stated that respondent's claim, "although appearing on the surface to charge negligence is, in truth, no more than a complaint seeking monetary recovery for an assault and battery" (*id.* at 11a).

Judge Garth remarked that "'negligence' claims such as [respondent] asserts have been filed with greater and greater frequency" (App., *infra*, 12a), and he observed that "[b]y far the greater number of courts that have dealt with claims similar to this one have found section 2680(h) to bar liability" (*id.* at 14a). Judge Garth stated that, in particular, the majority erred by not following *Naisbitt* v. *United States*, 611 F.2d 1350 (10th Cir.), cert. denied, 449 U.S. 885 (1980); *Hughes* v. *United States*, 662 F.2d 219 (4th Cir. 1981), aff'g *Hughes* v. *Sullivan*, 514 F. Supp. 667 (E.D. Va. 1980); and *United States* v. *Shively*, 345 F.2d 294 (5th Cir. 1965).

The court of appeals denied rehearing en banc by a vote of 6-4 (App., *infra*, 33a-36a). Judge Garth wrote a dissenting statement in which he noted that "all of the other Courts of Appeals which have considered the issue presented here have held that [Section] 2680(h) bars recovery of claims similar to [respondent's]" (*id.* at 34a). Judge Adams, in his dissenting statement, urged that rehearing be granted for the following reasons (*id.* at 35a (citations omitted)):

> [T]he majority opinion in this case decides two questions of exceptional importance that deserve *in banc* consideration. The panel's affirmative answer to the first question, whether the intentional tort exception to the Federal Torts Claims Act, 28 U.S.C. 2680(h), allows a claim against the government for a murder committed by an off-duty serviceman, brings this Court into conflict with the law of several other Circuits. The panel's negative answer to the second question, whether the *Feres* doctrine precludes the kind of litigation that underlies this appeal, raises serious policy concerns about judicial review of military decisions.

REASONS FOR GRANTING THE PETITION

The court of appeals' holding that the intentional tort exception does not bar respondent's claim is inconsistent with the language and the manifest purposes of that provision and conflicts with the decisions of every other court of appeals that has considered the issue. In addition, the court of appeals' approach, if it were to prevail, would be likely to precipitate frequent FTCA actions alleging that the government's negligence was responsible for a crime committed off duty by one of the government's several million servicemen or civilian employees, and would hold the government liable whenever it was found not to have adequately supervised the off-duty activities of one of its employees—an expansive and burdensome liability that is not imposed on ordinary employers by the common law.

The court of appeals' holding that the *Feres* doctrine does not bar respondent's claim is also in error and would require courts to second-guess military officers' decisions about the discipline, morale, control, and discharge of servicemen. Further review is therefore warranted.

1. a. The court of appeals' principal holding—that the intentional tort exception of the FTCA, 28 U.S.C. 2680(h), does not bar respondent's claim—conflicts with the decisions of every other court of appeals that has considered this issue. In *Naisbitt* v. *United States*, 611 F.2d 1350, cert. denied, 449 U.S. 885 (1980), the Tenth Circuit refused to entertain a claim indistinguishable from respondent's: the victims of crimes committed off

the base by two off-duty servicemen, which had resulted in the death of three persons and serious injury to two others, brought suit under the FTCA, alleging that "the United States was guilty of actionable negligence in failing to supervise and curtail the two airmen in question" (*id.* at 1351). The court of appeals held that the claim was barred by the intentional tort exception (*id.* at 1353-1356), remarking that "[t]here is a dearth of authority" to the contrary (*id.* at 1356). The Tenth Circuit has recently reaffirmed this holding. *Wine* v. *United States*, 705 F.2d 366 (1983).

In *Hughes* v. *United States*, 662 F.2d 219 (4th Cir. 1981), aff'g *Hughes* v. *Sullivan*, 514 F. Supp. 667 (E.D. Va. 1980), the complaint charged that a postman on his delivery route took indecent sexual liberties with two minors and that the government had "acted negligently in failing to relieve [the postman] of his delivery duties" after a previous, similar incident (662 F.2d at 220). The court of appeals held that "the claims, although framed in terms of negligence, actually arose out of the assaults and batteries committed by [the employee]. * * * [G]overnment liability was thereby precluded under 28 U.S.C. § 2680(h)." 662 F.2d at 220. The district judge, whose reasoning was adopted by the court of appeals (*ibid.*), relied in part on *Naisbitt*. See 514 F. Supp. at 668.

Finally, in *United States* v. *Shively*, 345 F.2d 294 (5th Cir. 1965), a person who was shot and injured by a serviceman sued under the FTCA, claiming that the Army negligently issued a pistol to the serviceman even though it had reason to know that he would use it to assault the plaintiff. The court of appeals, reversing a judgment in favor of the plaintiff, stated that the plaintiff's claim "is a 'claim arising out of assault,' which is, in those words, specifically excepted from recovery under the Federal Tort Claims Act, 28 U.S.C. § 2680(h)." *Id.* at 297.

The court below attempted to distinguish *Naisbitt* on the ground that the "complaint [in *Naisbitt*] failed to assert any facts" substantiating the allegation of negligence (App., *infra*, 10a). The court of appeals did not expressly distinguish *Hughes* and *Shively*, although it suggested that those cases also involved "artful pleadings with conclusionary allegations" (App., *infra*, 8a). There is no basis for these distinctions. Nothing in the opinions in *Naisbitt* or *Wine*—both of which affirmed the dismissal of complaints—suggests that the Tenth Circuit was concerned that the pleadings lacked factual substantiation; those decisions make it entirely clear that the Tenth Circuit will not entertain claims like respondent's, however they are pled. In *Hughes*, the opinions themselves recite facts that would support an allegation of negligence at least as well as the facts asserted by respondent (see 662 F.2d at 220; 514 F. Supp. at 667-668). *Shively* reversed a judgment in favor of the plaintiff, and the court of appeals expressly agreed with the district court's finding that the government was negligent (345 F.2d at 296).

b. The court of appeals' decision is also inconsistent with the language and the purposes of the intentional tort exception. Section 2680(h) bars "[a]ny claim *arising out of* assault [or] battery" (emphasis added). As Judge Garth noted in his dissent, "'Congress could easily have excepted claims *for* assault. It did not; it used the broader language excepting claims *arising out of* assault.'" App., *infra*, 14a, quoting *Collins* v. *United States*, 259 F. Supp. 363, 364 (E.D. Pa. 1966). Respondent's claim "arises out of" an assault and battery within the plain meaning of that term. This Court has recently interpreted another FTCA exception that is similarly phased according to its literal meaning. *Kosak* v. *United States*, No. 82-618 (Mar. 21, 1984), slip op. 5-7. The court of appeals erred in not inter-

preting Section 2680(h) according to its plain meaning and affirming the dismissal of respondent's claim.

Moreover, a central purpose of Section 2680(h) is, indisputably, to exempt the government from liability for the intentional torts of its employees when they are acting *within* the scope of their employment. It is evident that a claimant could not attempt to circumvent this limitation on the government's *respondeat superior* liability by alleging that the government was negligent in its supervision of the employee in question. But if Congress meant to bar claims based on the intentional torts of government employees acting within the scope of their duties, it could not possibly have intended that the government be responsible for intentional torts committed by employees who were acting outside the scope of their duties and were therefore even less subject to the government's supervision and control.[3] Justice (then Judge) Harlan explained that a purpose of Section 2680(h) is to exempt the government from liability for "activities which practically, even though not legally, speaking are outside the scope of a government employee's proper official functions" (*Panella* v. *United States*, 216 F.2d 622, 625 (2d Cir. 1954)); *a fortiori*, the government should not be held responsible for acts like Heard's that are without question wholly outside the scope of the tortfeasor's duty and have no connection whatever to his government service.

Indeed, the court of appeals' decision imposes on the government a novel form of liability that is unknown at common law—a result that Congress could not have intended when it enacted the FTCA. At common law, if an employee is acting outside the scope of his authority, the employer has no general duty to exercise reasonable care to prevent the employee from injuring

[3] There is no suggestion in this case that Heard was acting within the scope of his authority.

others. See Restatement (Second) of Torts §§ 315, 317 (1965).[4] This is true even if the employer knows of the employee's dangerous proclivities (see Restatement (Second) of Torts § 314 (1965)[5]) and even if the employer is fully able to control the employee's off-duty activities. See, *e.g.*, Restatement (Second) of Torts § 317 comment *b* ("[A] factory owner * * * is not required * * * to exercise any control over the actions of his employees while on the public streets or in a neigh-

[4] Section 315 provides:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Section 317, which describes the extent to which such a "special relation" exists between an employer and an off-duty employee who harms another, provides that "[a] master is under a duty to exercise reasonable care * * * to control his servant while acting outside the scope of his employment * * * if * * * the servant * * * is upon the [master's] premises * * * or [premises] * * * the servant is privileged to enter only as his servant, or * * * is using a chattel of the master * * *." There is no allegation that Heard was on government premises or was using a chattel belonging to the government when he killed Shearer, and the court of appeals' decision accordingly is not limited to cases in which, for example, a serviceman uses his service weapon to commit a tort. In any event, since Section 2680(h) would exempt the government from liability if a service weapon were used to commit an intentional tort by a serviceman who was *on* duty, and acting within the scope of his employment, Congress could not have intended that the government be held liable for the tortious off-duty use of such a weapon.

[5] Section 314 provides:

> The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.

boring restaurant during the lunch interval, even though the fact that they are his servants may give him the power to control their actions by threatening to dismiss them from his employment if they persist."); Prosser, *Torts* 275 (4th ed. 1971) ("It must be remembered that the mere fact that misconduct on the part of another might be foreseen is not of itself sufficient to place the responsibility upon the defendant.").

At common law, therefore, a private employer of Heard would not be liable in the circumstances alleged in respondent's complaint. There is no reason whatever to believe that Congress intended to subject the government to such a wholly novel form of liability. To the contrary, it is clear from the language of the Act itself that the government's liability under the FTCA is to be no broader than that of a private party in similar circumstances (see 28 U.S.C. 1346(b) and 2674). Moreover, an authoritative source on the meaning of the FTCA (see *Kosak*, slip op. 8-9) explained to Congress that the "theory" of the intentional tort exception "is that, since this bill is a radical innovation, perhaps we had better take it step by step." *Tort Claims: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 22 (1940) (statement of Alexander Holtzoff). Since, as this statement shows, the intentional tort exception was designed to exempt the government even from certain well-established forms of liability to which private parties are subject, Congress could not have intended to subject the government to a form of liability unknown at common law.[6]

[6] Where the government undertakes the responsibility of supervising a person known to be dangerous—such as by operating a prison, school, or hospital for dangerous persons—several cases have held that it will be liable if its agents fail to discharge that responsibility with due care. See, *e.g.*, *Muniz* v. *United States*, 305 F.2d 285 (2d Cir. 1962), aff'd, 374 U.S. 150 (1963) (prisoner); *Panella* v. *United States*, *supra* (inmate at public health service hospital). See also Restatement (Second) of Torts § 319 (1965):

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

There is, however, no suggestion in this case that the government had "take[n] charge" of Heard in this sense or otherwise assumed any special responsibility for protecting others from him (see App., *infra*, 21a (Garth, J., dissennting)); the military, unlike a prison or a psychiatric ward, is not an institution established to supervise persons known to be dangerous.

The court of appeals relied (App., *infra*, 8a-9a) on a decision in this line of cases, *Gibson* v. *United States*, 457 F.2d 1391 (3d Cir. 1972). But as Judge Garth pointed out in dissent (App., *infra*, 19a-21a), the court in *Gibson* carefully explained that it was not imposing on the government a general duty to supervise all those whose behavior it might be able to influence (see 457 F.2d at 1394).

2. The court of appeals also erred in reversing the district court's holding that the *Feres* doctrine bars respondent's claim. *Feres* established that the FTCA does not waive the government's sovereign immunity from suits by servicemen for alleged torts that are incident to military service. This Court has explained that the *Feres* doctrine is principally based on the following considerations:

> [T]he "peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty...."

United States v. *Muniz*, 374 U.S. 150, 162 (1963), quoting *United States* v. *Brown*, 348 U.S. 110, 112 (1954). See *Chappell* v. *Wallace*, No. 82-167 (June 13, 1983), slip op. 3. The Court has also explained that the

purpose of the *Feres* doctrine is to avoid a trial at which courts must engage in "second-guessing military orders" and at which the "issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety." *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977).

The court of appeals' decision is inconsistent with each of these objectives of the *Feres* doctrine. Respondent's claim, which is made on behalf of a serviceman,[7] directly challenges several military orders. Specifically, respondent alleges that Shearer's superiors at Fort Bliss and elsewhere in the Army injured him because they: (i) "negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard," (ii) failed to "take any action to prevent [Heard] from endangering other persons," (iii) "failed to warn other persons that [Heard] was at large, and of the danger which he presented[,]" and (iv) "negligently and carelessly failed to then remove Andrew Heard from active military duty" (C.A. App. 17a-18a). Respondent thus seeks to have the courts inquire into basic decisions about the discipline, control, and discharge of Heard and into whether Shearer's superior officers exercised a sufficient degree of care in protecting him from another serviceman. These are principal examples of "'[t]he complex, subtle, and professional decisions as to the composition, training, * * * and control of a military force [that] are essentially professional military judgments'" (*Chappell*, slip op. 6, quoting *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973)) and that should not be second-guessed by a court at the behest of a serviceman.

[7] It is immaterial that the suit was brought not by the serviceman but by a party claiming on his behalf; *Feres* itself was a suit by the executrix of the injured serviceman (see 340 U.S. at 136-137). See also App., *infra*, 25a n.1.

The court of appeals ruled that respondent's claim was not barred by *Feres* because Shearer was off the base and on personal business at the time he was murdered. See App., *infra*, 5a-7a. But the location of the murder committed by Heard and Shearer's off-duty status at the time are immaterial, because respondent cannot establish her claim simply by showing that Heard's actions were tortious. Rather, respondent seeks to demonstrate that Shearer's superior officers committed a tort against him by failing to give him adequate warnings about a dangerous fellow serviceman and by failing to ensure that that serviceman was discharged. These actions and decisions of Shearer's superior officers were clearly "incident to [Shearer's] service" (*Feres*, 340 U.S. at 146); according to respondent, they constitute a breach of a duty that Shearer's superior officers owed to their subordinates. As the district court explained (App., *infra*, 26a), it is of no significance that the asserted consequence of the military decisions that allegedly constituted a breach of this duty did not befall Shearer until he happened to be off base and off duty.[8]

[8] The court of appeals' decision on the *Feres* issue cannot be reconciled with *Brown* v. *United States*, No. 83-1234 (8th Cir. July 20, 1984). The plaintiff in *Brown* sued on behalf of a member of the National Guard, Briscoe, who was allegedly the victim of a racially motivated intentional tort committed by other members of the Guard. The incident occurred at a party on the military base where all the servicemen were stationed, but all the servicemen were off duty at the time. The plaintiff alleged, among other things, that superior officers negligently failed to prevent the incident and failed to perform an adequate investigation.

The court of appeals held (slip op. 13-14) that these claims were barred by *Feres*:

> The claim that various officers negligently failed to prevent the incident directly calls into question the disciplinary decisions of Briscoe's superior officers. Presumably what would be litigated is whether the officers should have issued some type of order, or otherwise taken disciplinary

The court of appeals relied (App., *infra*, 5a-7a) on *Brooks* v. *United States*, 337 U.S. 49 (1949), which held that an off-duty serviceman can sue under the FTCA for injuries sustained in an off-base automobile accident with a military vehicle. But in *Brooks*, the duty breached by the driver was not a duty owed to the plaintiff because he was a serviceman (see 337 U.S. at 52), but a duty owed equally to all members of the general public.[9] The suit therefore would not have required

---

action, to prevent any type of racially motivated actions. Under the *Feres* doctrine such a lawsuit cannot be maintained—it strikes precisely at the type of command relationship between a service member and his or her superior officers that is at the heart of the military disciplinary structure. Similarly, the claim that various officers failed to perform a proper investigation strikes directly at military decisionmaking with respect to a disciplinary matter. The *Feres* doctrine will not permit a court to second-guess the military decisions as to how an investigation into a disciplinary matter should have been conducted.

The court of appeals did not consider it decisive that the injury in *Brown*, unlike the injury to Shearer, was inflicted on a military base. See slip op. 10-11. Other circuits have similarly applied *Feres* to preclude claims for injuries that occurred while the serviceman was off the base. See, *e.g.*, *Johnson* v. *United States*, 631 F.2d 34, 37 (5th Cir. 1980), cert. denied, 451 U.S. 1018 (1981) (*Feres* bars a claim for injury that occurred when serviceman was off duty and off base because "all the government actions that resulted in [the serviceman's] death were directly and substantially related to his military service."). It also was not significant that Briscoe was a member of the National Guard (see slip op. 7). Accordingly, it appears that the Eighth Circuit would have held that respondent's claim was precluded by *Feres*.

[9] Here, as we have noted, respondent appears to have alleged only a breach of duties owed to Shearer by virtue of his status as a serviceman, and in any event it is clear—as the courts of appeals ruled in *Naisbitt* v. *United States*, *supra*, and *United States* v. *Shively*, *supra*—that respondent's claim cannot be based upon a breach of a duty owed to the public at large.

courts to second-guess a military decision about the degree of care to be shown to a serviceman.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
DAVID A. STRAUSS
Assistant to the Solicitor General
ANTHONY J. STEINMEYER
ROBERT V. ZENER
Attorneys

AUGUST 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1089

SHEARER, LOUISE, IND. AND AS ADMINISTRATRIX OF THE ESTATE OF SHEARER, VERNON, DECEASED, APPELLANT

v.

UNITED STATES OF AMERICA
C/O PETER F. VAIRA, U.S. ATTORNEY, APPELLEE

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA
D.C. Civil No. 82-0082

Argued: October 24, 1983
Before: GIBBONS, GARTH AND HIGGINBOTHAM,
Circuit Judges
(Filed: December 19, 1983)

OPINION OF THE COURT

HIGGINBOTHAM, A. LEON, JR., *Circuit Judge*

Once again, we are asked to decide the rights of a serviceman who, while on authorized leave and off base, suffered a fatal injury because of, *inter alia*, the alleged negligence of persons within the command hierarchy of the United States Army ("Army"). We are

confronted with the traditional defenses of the *Feres*[1] doctrine and a claim of the inapplicability of the Federal Tort Claims Act.

Plaintiff-appellant Louise Shearer brought this action against defendant-appellee, the United States, under the Federal Torts Claim Act ("FTCA"), 28 U.S.C. Sections 1346(b), 2671-2680, claiming that the negligence of the Army caused the murder of her son Private Vernon Shearer. Relying on the *Feres* doctrine, the district court granted the government's motion for summary judgment. Appellant challenges the district court's decision presenting two issues for consideration on this appeal: whether either the *Feres* doctrine or the intentional tort exception to the FTCA bars appellant's action.

We hold that neither the *Feres* doctrine nor the intentional tort exception to the FTCA bars appellant's claim. We therefore will reverse the district court's order granting summary judgment to the United States and will remand this case to the district court.

I.

For the purposes of this appeal, we must accept as true the following facts pleaded by appellant—the party against whom summary judgment has been ordered: the decedent, Vernon Shearer, was an eighteen-year old private in the Army stationed at Fort Bliss, Texas. Having been in the Army barely four months, on June 2, 1979, while off the military reservation on an

[1] *Feres* v. *U.S.*, 340 U.S. 135 (1950). The *Feres* doctrine has been subjected to severe criticism by some commentators. *See* Tort Remedies for Servicemen Injured by Military Equipment: A Case for Federal Common Law, 55 N.Y.U.L.Rev. 601, 629-35. 631 n.173 (1980); Note, From *Feres* to *Stencel*: Should Military Personnel Have Access to FTCA Recovery? 77 Mich.L.Rev. 1099, 1102-21 (1979). Nonetheless, the Supreme Court has indicated no desire to reconsider this judicially created doctrine.

authorized leave from his unit, Shearer was "kidnapped at point of gun and shot to death" in New Mexico by Private Andrew Heard. Heard was also off-duty.[2] Three years before, while stationed in Germany, Heard also had been prosecuted for what was alleged to be a gruesome murder of a German woman. The indictment alleged that he had "inflicted serious head injuries on the 38-year-old Margarete Hess on the occasion of sexual actions by means of a wrench and a lifting jack." Appendix ("App.") at 13a. Heard served three years of a four year sentence in Germany. His attack on Shearer occurred less than four months after his release from prison for the murder of Margarete Hess.

At the time of the kidnapping and murder of Shearer, the Army was well aware of Heard's record of violence, but had disregarded three of Heard's superiors who recommended that "Heard be eliminated from the Service under Chapter 14, Army Regulations 635-200." App. at 14a. His Battalion Commander in Germany, Lieutenant Colonel Rayburn C. Storvall, on December 7, 1978 had declared that "Private Heard is unsuitable for military service as his record discloses." *Id.* at 15a. That same day Lieutenant Colonel Storvall's recommendation was adopted by two other superiors of Heard, Colonel Donald E. Eckelbarger and Brigadier General Charles E. Canidy. Indeed, once Colonel Eckelbarger wrote that Heard's discharge "would be in the best interest of Private Heard and the United States Army." *Id.*

Despite the precise and unequivocal recommendations, the Army failed to make a "final determination" on Heard's discharge. More important, not until after Heard had murdered Shearer did the Army even bother to conduct a mental evaluation of Heard. *Id.*

[2] In a separate action Heard pleaded *nolo contendere* to the crime of "second degree murder and firearm enhancement." Appendix ("App.") at 16a.

Appellant argued that the Army was negligent in failing to discharge Heard from the Army, in failing to warn other enlisted personnel of Heard's violent propensities, and in failing to restrict Heard. Appellant's arguments concluded that the Army's failure in these regards proximately caused Shearer's death.

The United States responded to appellant's allegations by moving to dismiss Shearer's complaint on two grounds: Shearer's injury was "incident to military service" and therefore barred under the *Feres* doctrine. In the alternative, the United States argued that appellant's claim was one "arising out of assault and battery" and thus barred by the intentional tort exception of the FTCA.

The district court granted the United States' motion for summary judgment based on the *Feres* doctrine. The court did not decide the issue of the intentional tort exception to the FTCA.

II.

The FTCA permits suits against the United States for the "negligent or wrongful act" of a government employee. 28 U.S.C. § 1346, 2674. The scope of the FTCA, as it applies to the military, has been narrowed in a series of decisions which together comprise the *Feres* doctrine. The thrust of the *Feres* doctrine prevents an action against the government for "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *U.S.* v. *Brown*, 348 U.S. 110, 112 (1954); *Feres* v. *U.S.*, 340 U.S. 135, 146 (1950); *Jaffee* v. *U.S.*, 663 F.2d 1226, 1227 (3d Cir. 1981), *cert. denied*, 456 U.S. 972 (1982); *See Brooks* v. *U.S.*, 337 U.S. 49, 52 (1949).

The principle underlying this judicially created exemption is that the FTCA mandates minimum judicial interference with the "peculiar and special relationship of the soldier to his superiors. . . ." *Stencel Aero Engineering Corp.* v. *U.S.*, 431 U.S. 666, 671 (1977); *U.S.*

v. *Brown*, 348 U.S. at 112. Accordingly, *Feres* insulates the military from FTCA suits arising out of "negligent orders given or negligent acts committed in the course of" an injured serviceman's military duty. *Stencel Aero Engineering Corp.* v. *U.S.*, 431 U.S. at 671; *U.S.* v. *Brown*, 348 U.S. at 112. The pivotal question under the *Feres* analysis is whether the serviceman sustained the injury either in the "course of" or "incident to" his military service. *U.S.* v. *Brown*, 348 U.S. at 112; *Feres* v. *U.S.*, 340 U.S. at 146; *Jaffee* v. *U.S.*, 663 F.2d at 1233.

These terms "in the course of" and "incident to," however, are not self-evident truths that leap out to illuminate any factual situation. Consequently, courts must probe beneath these conclusionary statements and must identify more specific facts to determine whether an injury or death was sustained in the "course of" or "incident to" one's military service. Application of the doctrine focuses on the relationship between the serviceman and the military at the time and place the injury was sustained. The status and activity of the injured serviceman often seem to be the controlling factors.

The important distinguishing factors accounting for the different outcomes in these two cases: the status of the injured soldier at the time of injury, the place of the injury, and the nature of the activity engaged in, and whether the injured party was acting under orders or compulsion. These factors control *Feres* doctrine cases. *U.S.* v. *Brown*, 348 U.S. at 112; *Feres* v. *U.S.*, 340 U.S. at 146; *Jaffee* v. *U.S.*, 663 F.2d at 1232. *See Parker* v. *U.S.*, 611 F.2d 1007, 1013-15 (5th Cir. 1980); *Woodside* v. *U.S.*, 606 F.2d 134, 138-42 (6th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980); *Harten* v. *Coons*, 502 F.2d 1363, 1365 (10th Cir. 1974), *cert. denied*, 420 U.S. 977 (1975).

Generally, an off-duty serviceman not on the military base and not engaged in military activity at the time of

injury, can recover under FTCA; an on-duty serviceman, however, is usually barred from recovery. In *Brooks*, an off-duty serviceman hit by a military vehicle while he was engaged in personal business recovered under FTCA. *U.S.* v. *Brooks*, 337 U.S. at 50-52. In *Feres*, on the other hand, an on-duty serviceman killed in an on-base fire was barred from recovery. *Feres* v. *U.S.*, 340 U.S. at 136-38, 146.

In this case, appellant argues that the district court improperly applied the *Feres* doctrine to their claim. Specifically, they argue that the court neglected to focus on Shearer's activity and status at the time and place of his injury. On review, the record indicates that Shearer was not engaged in or acting incident to any military activity at the time of his murder. To the contrary, Shearer was on leave in another state (New Mexico) when he was kidnapped. The United States does not dispute that Shearer was on authorized leave and off the base at the time of his murder.

The district court's error stems from its singular focus on the status and activity of the allegedly negligent parties (i.e. Heard's superior officers) without considering the status and activity of the injured party. Consequently, the district court improperly concluded that appellant's "allegations relate directly to decisions of military personnel made in the course of the performance of their military duty, and therefore are barred." App. at 25a.

In support of its conclusion, the district court erroneously relied on *Johnson* v. *U.S.*, 631 F.2d 34, 36-37 (5th Cir. 1980) and *Henning* v. *U.S.*, 446 F.2d 774, 777 (3d Cir. 1971). These two cases did not adopt a tortfeaser status-activity analysis as the lower court suggested. Instead these cases merely restated a basic *Feres* doctrine rule. Malpractice to an active duty soldier in an army hospital is, by its very nature, considered activity "incident to military service," and therefore barred under *Feres*.[3] Both *Johnson* and *Henning* concerned injuries to servicemen allegedly stemming from their medical treatment in Army hospitals. Although receiving medical treatment in military hospitals may be considered an activity and benefit "incident to military service" and therefore barred under *Feres*, certainly *being kidnapped* off base at gun point can never be perceived as one of the activities or anticipated free benefits of being in the armed services. Thus, there is no legitimate basis on which *Feres* can bar appellant's claim.

For these reasons, we reverse the district court on this issue.

III.

The United States offers a separate ground, the intentional tort exception to the FTCA, as an independent basis to uphold the district court's summary judgment. The FTCA does not provide recovery for the intentional tort of assault and battery. Section 2680(h) of the Act carves out an intentional tort exception: "The provisions of this chapter and Section 1346(b) shall not apply to ... (h) [a]ny claim arising out of assault [and] battery...." 28 U.S.C. § 2680(h).

The United Sates argues that appellant's wrongful death claim falls within the intentional tort exception because it "arises out of" the assault and battery committed by Heard. Appellant disagrees, arguing instead that this action "arises out of" military negligence which proximately caused Shearer's death.

The FTCA does not necessarily bar a cause of action in negligence, even if the injury is directly caused by the assault and battery of a government employee. The FTCA simply requires that the intentional tort must

---

[3] *See Feres* two companion cases, *Jefferson* v. *U.S.*, 340 U.S. 135 (1950) and *U.S.* v. *Griggs*, 340 U.S. 135 (1950); *See Harten* v. *Coons*, 502 F.2d at 1365 n.6; *Lowe* v. *U.S.*, 440 F.2d 452-53 (5th Cir. 1971).

"have its roots in government negligence," *Gibson* v. *U.S.*, 457 F.2d 1391, 1395-97 (3d Cir. 1972); *Underwood* v. *U.S.*, 356 F.2d 92, 99-100 (5th Cir. 1966). Recovery under this exception could thus be barred if the negligence was a remote cause of the injury, or if the plaintiff, through artful pleadings with conclusionary allegations, attempts to create a negligence issue. *Gibson* v. *U.S.*, 457 F.2d at 1395-96. *See also Hughes* v. *Sullivan*, 514 F. Supp. 667, 669-70 (E.D. Va. 1980), *aff'd sub nom.*, *Hughes* v. *U.S.*, 662 F.2d 219, 220 (4th Cir. 1981); *Naisbitt* v. *U.S.*, 611 F.2d 1350, 1354-55 (10th Cir. 1980); *U.S.* v. *Shively*, 345 F.2d 294, 296-97 (5th Cir. 1965).

In order to withstand dismissal of a suit under the intentional tort exception to the FTCA, a plaintiff must allege sufficient facts which, if proven, would demonstrate that the government should have reasonably anticipated that one of their employees would commit an intentional tort. *U.S.* v. *Shively*, 345 F.2d at 296. For example, if an assault and battery occurred as a "natural result" of the government's failure to exercise due care, the assault and battery may be deemed to have its roots in negligence and therefore it is within the scope of the FTCA. *Id.*; *Gibson* v. *U.S.*, 457 F.2d at 1395-96.

In bringing a claim, however, a plaintiff cannot merely point to an assault and battery and then claim, based simply on the occurrence of the intentional tort, that the government was negligent for not having had anticipated the offensive action. *See Naisbitt* v. *U.S.*, 611 F.2d at 1356; *Gibson* v. *U.S.*, 457 F.2d at 1395-96. The plaintiff must allege sufficient independent facts to demonstrate that the government knew or should have known that the employee was dangerous prior to the injurious act. *Gibson* v. *U.S.*, 457 f.2d at 1395-96; *Underwood* v. *U.S.*, 356 F.2d at 99-100.

In *Gibson* v. *U.S.*, *supra*, 457 F.2d at 1395, a government employee assaulted another employee. The

district court's summary judgment order dismissing plaintiff's FTCA claim, was reversed on appeal. The court of appeals held that the intentional tort exception to the FTCA did not necessarily bar a negligence action against the government, even if the immediate cause of plaintiff's injury was an assault and battery. It reasoned that because the government knew that the assailants' class of employees were "dangerously sick," and because the government "failed to take reasonable measures" to insure plaintiff's safety, "[t]he attack ... was a foreseeable consequence of the government's failure to exercise due care... [I]t is not such an intervening act as will sever the necessary casual relation between the negligence and the appellant's injuries." *Gibson* v. *U.S.*, 356 F.2d at 99-100.

Similarly, in this case, appellant alleges specific facts indicating government knowledge of Heard's violent propensities. The following facts are critical: Heard had been convicted and imprisoned for killing a civilian while in the Army. He was released from the prison less than four months prior to killing Shearer. Several months before Shearer was murdered, high-ranking military officers, aware of Heard's violent disposition, recommended his discharge. Nevertheless, Heard remained in the Army and was treated as a member in good standing. Despite Heard's previous murder and the Army's knowledge of his disposition, enlisted men, including Shearer, were not warned about his violent past or present disposition. We believe these alleged facts are sufficient to withstand a summary judgment motion based on the intentional tort exception to the FTCA.

The United States relies on *Naisbitt* v. *U.S.*, 611 F.2d 1350 (10th Cir. 1980), to support its motion to dismiss under the intentional tort exception. This reliance is misplaced.

Naisbitt concerned the dismissal of a suit under the intentional tort exception to the FTCA where the alleged negligence was based on mere conclusionary allegations. There, two off-duty air force servicemen committed a number of rapes and murders, but the plaintiff's complaint failed to assert any facts suggesting that the government knew or should have known either of the prior violent actions by the assailants or of the assailant's potential violence. *Naisbitt* v. *U.S.*, 611 F.2d at 1356; *Naisbitt* v. *U.S.*, 469 F. Supp. 421, 422-23 (D. Utah 1979).

In this case, appellant's allegations, if proven, would permit a court to find that the government's negligence proximately caused Shearer's injury, thus, this case falls closer to the rubric of *Gibson* facts, not to that of *Naisbitt*. We therefore reject the United States' contention that summary judgment was justified under Section 2860(h), the intentional tort exception.

We will therefore reverse the judgement of dismissal of the district court and remand this case for further proceedings consistent with this opinion.

GARTH, J., *dissenting:*

The majority holds that neither *Feres* v. *United States*, 340 U.S. 135 (1950), nor the intentional torts exception to the Federal Tort Claims Act [FTCA], 28 U.S.C. § 2680(h) (1976), bars Shearer's cause of action. I cannot agree that Shearer has stated a cause of action that is not barred by *Feres* and by section 2680(h), and which would require a trial. Thus, I dissent from the majority's holding to that effect.

I.

Under the majority's analysis, for Shearer to recover in the face of *Feres* and section 2680(h), it must be demonstrated that her cause of action sounds in negligence, because a showing of negligence is required under

Feres and the FTCA, as a predicate to recovery. In my opinion, the circumstances of Shearer's case, however analyzed, cannot surmount the *Feres* hurdle.[1] However, even if *Feres* were not to bar Shearer's action as I believe it unquestionably does, Shearer still cannot escape the provision of the FTCA that bars claims arising out of an intentional tort—in this case, an assault and battery. *See* 28 U.S.C. § 2680(h).

Her complaint, although appearing on the surface to charge negligence is, in truth, no more than a complaint seeking monetary recovery for an assault and battery perpetrated by a fellow soldier upon her son. Congress, however, has refused to permit recovery against the Government for such intentional actions. It is for this reason that plaintiffs like Mrs. Shearer, with claims that are otherwise barred, have sought to overcome the

[1] While I agree that the courts that have employed a *Feres* analysis have reached results that do not always appear logical or consistent, it is not necessary for me to address *Feres* in the circumstances here presented. As my subsequent discussion reveals, I do not believe any bona fide negligence claim has been framed by Shearer, nor do I believe that the decision respecting Heard's discharge can be characterized as other than a military decision committed to the command function of the Army. I note, moreover, that the Government has relied heavily on *Henning* v. *United States*, 446 F.2d 774 (3d Cir. 1971), a case decided by this court, which held that the proper inquiry to be made when negligence is alleged is an inquiry directed to the time and place of the alleged negligence. In this case, the time and place of the alleged negligence was some months prior to Shearer's induction in the Army and took place in Germany. *See* note 5 *supra*. The majority opinion apparently does not recognize this doctrine, for rather than giving it effect, the opinion addresses the time and place that the injury was *sustained*. *See* Maj. Op. Typescript at 6, 8. However, any further discussion of *Feres* v. *United States*, 340 U.S. 135 (1950), would be meaningless because, as noted, the FTCA requires a legitimate cause of action sounding in negligence in order to recover against the Government. I therefore limit my discussion to section 2680(h).

obstacle of *Feres* and 2680(h), by framing their complaints in terms of the Government's alleged breach of duty, rather than in the substantively correct terms of an intentional tort. They have done so in order to provide the necessary predicate of a negligence cause of action.

Even a cursory review of recent case law involving the issue presented here, reveals that "negligence" claims such as Shearer asserts have been filed with greater and greater frequency. *See, e.g.*, cases collected in *Lambertson* v. *United States*, 528 F.2d 441, 444 (2d Cir. 1976); *see also Wine* v. *United States*, 705 F.2d 366, 366-67 (10th Cir. 1983); *Hughes* v. *Sullivan*, 662 F.2d 219 (4th Cir. 1981), *aff'g* 514 F. Supp. 667, 669-70 (E.D. Va. 1980); *Naisbitt* v. *United States*, 611 F.2d 1350, 1353-56 (10th Cir. 1980), *cert. denied* 449 U.S. 885 (1980); *Taylor* v. *United States*, 513 F. Supp. 647 (D.S.C. 1981); *Davidson* v. *Kane*, 337 F. Supp. 922, 923 (E.D. Va. 1972); *United States* v. *Shively*, 345 F.2d 294, 296-97 (5th Cir. 965). A pattern has apparently developed by which the true nature (intentional tort) of a claimant's cause of action against the Government is subordinated to a purported cause of action sounding in negligence. The effort in these cases is an obvious attempt to escape the consequences of the Supreme Court's decision in *Feres* and Congress' determination to limit the Government's tort liability. *See* 28 U.S.C. § 22680. Prior to today, this court has yet to confront this problem directly, although we have approached the issue tangentially in *Gibson* v. *United States*, 457 F.2d 1391 (3d Cir. 1972), which I discuss in this dissent.

Because I believe (1) that it is important to implement the legislative command of Congress and to thus put this issue to rest once and for all (*compare Bryson* v. *United States*, 463 F. Supp. 908 (E.D. Pa. 1978) *with Collins* v. *United States*, 259 F. Supp. 363 (E.D. Pa. 1966), and (2) because I believe that the majority's analysis is incompatible with the better-reasoned analyses of other Courts of Appeals, *see* typescript at 7-11, *infra*, thereby leading to still another conflict among these Courts, and (3) because I believe that the constantly recurring claims under *Feres* and the FTCA require some degree of jurisprudential consistency in this court, to say nothing of consistency with decisions of other Courts of Appeal, I find it necessary to dissent.

II.

Section 2680(h) of Title 28 provides that the provisions of the FTCA shall not apply to "any claim *arising out* of assault, battery, * * *." (Emphasis added). Because the Government has not consented to be sued for such a tort, a federal court is therefore without jurisdiction to entertain any suit which arises out of an assault and battery. Thus, if the claim being pressed by Shearer sounds not in negligence but in assault and battery, then it unquestionably must be barred by this statutory exception to federal liability under the FTCA.

Mrs. Shearer, of course, stresses that her cause of action is not concerned with the attack upon her son by Heard, an attack that resulted in her son's death. Rather she claims that her cause of action is focused upon the negligence of the Government in not discharging Heard or otherwise supervising him adequately.[2] The Government responds, however, that the negligence claim is just a cloak for what is really an assault and battery claim at heart. Because I believe that real-

---

[2] At oral argument, Shearer's counsel limited the grounds of alleged negligence to these two aspects, even though Shearer's Proposed Amended Complaint charges in paragraph 41 that "[t]he United States Government ... failed to warn other persons that he [Heard] was at large, and of the danger which he presented." App. 17a.

istically, logically, and precedentially, the Government's characterization and understanding of Shearer's cause of action is correct, I would find Mrs. Shearer's claim to be barred by section 2680(h).

A.

By far the greater number of courts that have dealt with claims similar to this one have found section 2680(h) to bar liability. In one of the first such cases, *Collins* v. *United States*, 259 F. Supp. 363 (E.D. Pa. 1966),[3] Judge Joseph S. Lord, III, said:

> It is true that the claim here is predicated on negligence. However, that negligence would have been without legal significance absent the alleged act of Brosz. Without that, there would have been no actionable negligence. It was the attack which served to attach legal consequences to defendant's alleged negligence. Congress could easily have excepted claims *for* assault. It did not; it used the broader language excepting claims *arising out of* assault. It is plain that the claim arose only because of the assault and battery, and equally plain that it is a claim arising out of the assult and battery. This being so, the United States has not waived its immunity as respects this claim.

Id. at 364. Other courts have reached the same conclusion when faced with a purported negligence claim that followed an intentional tort such as assault and battery. *See, e.g., Wine* v. *United States*, 705 F.2d 366, 366-67 (10th Cir. 1983); *Hughes* v. *Sullivan*, 662 F.2d 219 (4th

[3] In *Collins* v. *United States*, 259 F. Supp. 363 (E.D. Pa. 1963), a Post Office employee, "acting in the scope of his employment, 'pushed, hit and struck' the plaintiff." *Id.* at 364. The complaint alleged that the Government was negligent in hiring and retaining the employee "when it knew or should have known of his 'violent, vicious and malicious propensities.'" *Id.* The Government's motion to dismiss based on section 2680(h) was granted.

Cir. 1981), *aff'g* 514 F. Supp. 667, 669-70 (E.D. Va. 1980); *Naisbitt* v. *United States*, 611 F.2d 1350, 1353-56 (10th Cir. 1980), *cert. denied* 449 U.S. 885 (1980); *Taylor* v. *United States*, 513 F. Supp. 647 (D.S.C. 1981); *Davidson* v. *Kane*, 337 F. Supp. 922, 923 (E.D. Va. 1972). These cases remind us that, when we are called upon to decide whether the exception for intentional torts is applicable, we must look not to the theory that the plaintiff may have selected. Rather, "the decisive factor is whether, *in substance and essence*, the claim arises out of an assault and battery." *Nichols* v. *United States*, 236 F. Supp. 260, 263 (N.D. Miss. 1964), quoted in *Coffey* v. *United States*, 387 F. Supp. 539, 540 (D. Conn. 1975) (emphasis added).

An examination of the *Naisbitt* case from the Tenth Circuit and the *Hughes* case from the Fourth Circuit reveals what I believe to be the proper analysis and thus the proper disposition of a case such as the one before us.

In *Naisbitt*, *supra*, two off-duty members of the United States Air Force entered a privately-owned retail store in Ogden, Utah, and "committed a variety of atrocious acts including assault, rapes, batteries and murders against the plaintiffs and the plaintiffs' decedents. Five persons were shot and three were killed." 611 F.2d at 1351. The plaintiffs based their case on the theory that "the United States was guilty of actionable negligence in failing to supervise and curtail the two airmen in question in that it was reasonably foreseeable that they would, unless restrained, perpetrate serious injuries." *Id.* The district court granted the Government's motion to dismiss on the ground that the claim actually arose from assaults and batteries and was therefore barred by section 2680(h), the intentional tort exception. *See* 469 F. Supp. 421, 423 (D. Utah 1979). That court found that the negligence theory was "merely an alternative theory of liability." *Id.*

The Tenth Circuit affirmed the district court's holding, concluding that section 2680(h) barred the action then before it. After discussing the cases from other courts dealing with this problem, the Tenth Circuit stated:

> In summary: There is a strong thread running through most of these cases [and it] is that which recognizes the immunity of the government where the assailant is an employee of the government. This is applied regardless of whether the employee is on duty.... There is a dearth of authority allowing an action to be prosecuted against the government under the Tort Claims Act where the intervening assailant was an employee. In any case in which the employee has intentionally injured another, the tort asserted against the government, regardless of whether it is called negligence, is indeed an intentional tort attributable to the government.

611 F.2d at 1356.[4]

In *Hughes, supra*, a uniformed postal employee was arrested and charged with taking indecent sexual liberties with a twelve-year-old girl in between mail routes. He pleaded guilty to a lesser charge and was ordered to submit to psychiatric treatment. Shortly thereafter, the girl's father personally requested of the employee's supervisor that the perpetrator be relieved of his postal duties, but the request was denied and the

---

[4] The Court went on to conclude:

> Finally, the particular facts of this case lead to the conclusion that the tort which is the basis of the lawsuit was intentional and subject to § 2680(h) because it was, as a matter of law, an intervening force of such great magnitude that it rendered the negligence of the government in failing to control the assailants insignificant in comparison. The character of the act is so predominantly intentional that the negligence as a causal force is virtually nonexistent.

611 F.2d at 1356.

employee resumed his duties. Several years later, the same employee, while on his route, lured two other young girls into his postal truck and took indecent sexual liberties with them. Their mother brought suit against the United States, claiming that the postal supervisor acted negligently in failing to relieve the employee of his delivery duties after the first incident. The district court dismissed the suits on the ground that the claims, although sounding in negligence, actually arose out of the assaults and batteries committed by the postal employee, and that they were therefore barred by the intentional tort exception found in section 2680(h).

The Fourth Circuit affirmed that decision "for reasons adequately stated by the district court." 662 F.2d at 220. The district court had analyzed similar cases from other courts and had chosen to follow the lead of the *Naisbitt* court, saying:

> The alleged negligence of the government employee in retaining [the perpetrator] Sullivan was not the proximate cause of the assault. The proximate cause of the assault is the wilful and intentional act of Sullivan.... The basis of the negligence is that of Sullivan, not of the postmaster in retaining Sullivan in the service. True, the [complaint] does allege that the United States had knowledge of indecent conduct on the part of Sullivan in 1974, but kept him in its employ, and refused a request of others to transfer Sullivan to another position; that the negligent keeping of him in his employment and the failure to transfer was the proximate cause of the assault. *But there would have been no assault except for the separate and independent acts of Sullivan. Without his independent assault, there would be no cause of action. It is to this action the statute does not waive immunity.*

Hughes, 514 F. Supp. 667, 670 (E.D. Va. 1980) (emphasis added).[5]

The majority opinion, in holding that 28 U.S.C. § 2680(h) does not bar shearer's claim, relies heavily on the Fifth Circuit case of *United States* v. *Shively*, 345 F.2d 294 (5th Cir. 1965). I find this citation and the majority's reliance upon it puzzling. In *Shively*, Sergeant Lancaster, who was off-duty and in civilian clothers, was negligently issued a pistol by the non-commissioned officer in charge of the Arms Room. The issuance of a weapon under such circumstances was prohibited by both Army regulations and Army custom, and held by both the district court and the court of appeals to be negligent. Lancaster proceeded to shoot his recently divorced wife and kill himself. The Court of Appeals for the Fifth Circuit held that: (1) the intervening assault by Lancaster on his ex-wife, and not the negligent issuance of the weapon to him, was the sole proximate cause of the injury, 345 F.2d at 297, and (2) the injured ex-wife's claim "is a 'claim arising out of assault,' which is, in those words, specifically excepted

[5] Indeed, there would have been no assault here except for the "separate and independent" act of Heard. Such an intervening act (here, the intentional assault and murder) has been held to be of such significance that even if the Army had initially been negligent, the subsequent act renders the negligence insignificant as a causal force. *See Naisbitt*, 611 F.2d at 1356; *United States* v. *Shively*, 345 F.2d 294, 296-97 (5th Cir. 1965). It should not go unmentioned that at the time that Heard was convicted and confined in Germany, leading to an Army officer's recommendation that he be discharged from the Service, Shearer had yet to join the Service. Shearer entered the Service on January 22, 1979 in Ft. Knox, Kentucky. Heard was released from Germany and transferred to the United States on February 3, 1979. Heard was not transferred to Ft. Bliss, Texas, until March 5, 1979. Shearer was not transferred to Ft. Bliss until May 5, 1979.

from recovery under the Federal Tort Claims Act, 28 U.S.C. § 2680(h)." *Id.*

Thus, *Shively* holds that, where the intervening act was the cause of the injury—as was the case here—even if negligence has been alleged, the claim, because it arises out of the shooting or assault, is excepted from recovery. Hence, *Naisbitt*, *Hughes*, and *Shively* are completely consistent in their analysis and holdings that section 2680(h) bars any recovery of damages for claims arising out of an intentional assault.

B.

The analysis in *Naisbitt*, *Hughes*, and *Shively* finds support in this court as well. In a case decided under a *Feres* analysis, Judge Rosenn, writing for our court, took great pains to distinguish the circumstances that occurred in *Gibson* v. *United States*, 457 F.2d 1391 (3d Cir. 1972), from the circumstances present in *Naisbitt* and *Hughes*. In so doing, he explained why the exception found in 28 U.S.C. § 2680(h) did not bar Gibson's recovery but would bar recovery by an individual such as Shearer who was the victim of an assault and battery.

Gibson had been hired by the Federal Electric Co. to train Job Corps enrollees at the Raritan Arsenal in New Jersey. On November 5, a Job Corps enrollee (Jessie, a juvenile delinquent with a known addiction to narcotics), while under the influence of narcotics and while employed by the United States, "plunged a screwdriver through the appellant's temple while the latter was engaged in the performance of his duties as a Job Corps leader and instructor." *Id.* at 1393. In addition, Gibson alleged that there had been other incidents at the Arsenal and that the supervising federal office was aware of the dangerous situation. This court held:

> First, the attack upon Gibson was a foreseeable consequence of the Government's failure to exercise due care *under the circumstances* and, there-

fore, it *is not such an intervening act as will sever the necessary causal relation between the negligence and the appellant's injuries.*

> Here, the very risk which constitutes the defendant's negligence is the probability of such action. It is clear that when such action occurs, it should not insulate the defendant's negligence under the causation formula. In other words, it is clearly unsound to afford immunity to a negligent defendant because the intervening force, the very anticipation of which made his conduct negligent, has brought about the expected harm.

Id. at 1395 (footnote omitted). In distinguishing the *Gibson* situation from the *Collins* situation, Judge Rosenn wrote:

> [*Collins*] is the classic case of an intentional assault and battery except for the conclusory allegation that the Government knew or should have known the postal clerk had "malicious propensities." This conclusory statement, however, is based upon the very assault for which the action is brought. In this case, we are concerned with trainees who are drug addicts and have behavioral problems, under the care of the Government in a controlled environment and program designed to rehabilitate them. *The Government accepted the duty of caring for and controlling them knowing of their drug addiction and instability. It was obliged to exercise reasonable care to prevent them from harming others.*

Id. (emphasis added).[6]

---

[6] *See also Loritts* v. *United States*, 489 F. Supp. 1030, 1031-32 (D. Mass. 1980) (rape of choral member on West Point campus by Government employee attributable to negligence of Government in not providing adequate protection for invited guest): *Bryson* v. *United States*, 463 F. Supp. 908, 912 (E.D. Pa. 1978) (alleged negligence of United States Army in failing to remove soldier which resulted in death of Army private at hands of fellow serviceman held to state a cause of action in negligence).

Neither *Loritts* nor *Bryson* affect the analysis which I advocate here. In *Loritts*, the district court expressly found that the Academy had voluntarily undertaken the task of providing escorts to the choral group, and having assumed that responsibility, its failure to carry out that obligation subjected the Government to liability. Indeed, the district court, acknowledging those cases which seek to circumvent section 2680(h) by artful pleading, addressed that very issue and found that such was not the situation in *Loritts'* case.

Similarly, *Bryson* is not persuasive because it failed to analyze the Government's section 2680(h) contention other than to refer to *Gibson* v. *United States*, 457 F.2d 1391 (3d Cir. 1972), in a non-analytic fashion and, indeed, in my opinion, to misread the critical distinction made in *Gibson* and referred to in text above. In addition, *Bryson* concentrated on *Feres* rather than on 28 U.S.C. § 2680(h) in permitting recovery against the Government. I believe that the *Feres* analysis in *Bryson* is as flawed as its conclusory holding with regard to section 2680(h).

Here the record disclosed that the circumstances surrounding Shearer's unfortunate death come well within the exception of section 2680(h), as that exception is explained in the *Gibson* opinion. Heard was not known to have a medical or behavioral problem such as an addiction to mind-controlling drugs. All that was known was that Heard had committed a single crime—albeit the serious crime of manslaughter—in Germany. He had been sentenced to and had already served a period of incarceration in Germany. Heard was not part of a Government rehabilitation program. The Government never accepted the duty to care for or control him in a "controlled environment" or "rehabilitation program." Therefore, the Government could not be found to have accepted any special obligation to exercise reasonable care with regard to preventing Heard from harming Shearer or anyone else. *See* note 5 *supra*.

Based on these critical factual distinctions, I find the rationale of *Naisbitt*, *Hughes*, *Shively* and *Gibson* (distinguishing *Collins*), as well as the other cases that proceed in a similar vein, to be exceedingly persuasive. The distresing event that gave rise to the chain of events culminating in this lawsuit was the heinous murder committed by Andrew Heard. For this crime Heard has been sentenced to prison for a term of fifteen to fifty-five years. I recognize that often the punishment received by a convicted criminal provides little solace or compensation to the victims of the crime. Yet, this unfortunate result still does not automatically convert what is essentially a cause of action for assault and battery into a cause of action for negligence against the perpetrator's employer.

I am aware that when the employer is the United States Government, that result is even more unfortunate because Congress has seen fit to limit the federal government's tort liability so as to completely exclude liability arising out of intentional torts which are committed by Government employees. *See* 28 U.S.C. § 2680(h) (1976). However, the merits of the exceptions to the Federal Tort Claims Act,[7] like the merits of the *Feres* doctrine, are not at issue before this court. What is before us is a cause of action framed in terms of negligence, which is, in my opinion, nothing more than a subterfuge for an intentional assault and battery claim that is barred as such under the FTCA. As Judge Van

[7] The statute, 28 U.S.C. § 2680 (1976), excepts claims arising in or out of (a) discretionary functions, (b) postal matters, (c) tax collections or customs duty, (d) certain suits in admiralty, (e) administration of Title 50, sections 1-31, (f) quarantine established by the government, (h) intentional torts (the exception that is relevent in this case), (i) operations of the Treasury, (j) wartime activities, (k) a foreign country, (l) the activities of the Tennessee Valley Authority, (m) the activities of the Panama Canal Company, and (n) certain Federal banks.

Graafeiland said, writing for the Second Circuit, in *Lambertson* v. *United States*, 528 F.2d 441, 444 (2d Cir. 1976), "[t]o say that plaintiff's claim was not one 'arising out of' a battery would be to blink at the exclusionary provisions of § 2680." After listing a collection of cases in which plaintiffs sought to avoid the intentional tort exclusions of section 2680(h) by claiming negligence, *id.*, Judge Van Graafeiland continued: "[T]o permit plaintiff to recover by 'dressing up the substance' of battery in the 'garments' of negligence would be to 'judicially admit at the back door that which has been legislatively turned away at the front door.'" *Id.* at 445, quoting *Laird* v. *Nelms*, 406 U.S. 797, 802 (1972).

Because I can discern no *bona fide* negligence claim on which Shearer predicated her cause of action, I have not addressed the *Feres* doctrine, *see* note 1 *supra*; and I would affirm the district court's judgment in favor of the Government on the ground that the exception to the FTCA, 29 U.S.C. § 2680(b), bars Shearer's action.[8]

Accordingly, I respectfully dissent.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

[8] Because the district court ruled in favor of the Government on the *Feres* doctrine, holding that *Feres* barred Shearer's claim, it did not reach, and therefore did not address, the exception to the FTCA found in 28 U.S.C. § 2680(h), which would bar a claim arising out of an assault and battery.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 82-0082

LOUISE SHEARER, INDIVIDUALLY, AND AS
ADMINISTRATRIX OF THE ESTATE OF
VERNON SHEARER, DECEASED

v.

UNITED STATES OF AMERICA

DECEMBER 27, 1982

MEMORANDUM AND ORDER

HANNUM, J.

Presently before the Court in this civil action is Defendant's Motion for Summary Judgment. This case is brought pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 *et seq.*

The facts relevant to defendant's motion are essentially undisputed. Plaintiff is the mother and administratrix of the estate of Vernon Shearer. Vernon Shearer was a private in the United States Army in June of 1978, stationed at Fort Bliss, Texas. On June 2, 1978, while Vernon Shearer was on authorized absence from Fort Bliss, he was shot and killed by another off-duty Army private, Andrew Heard. This incident took place off-base in Otero County, New Mexico.

On January 7, 1982, plaintiff filed suit in this Court alleging that the United States had been negligent in failing to exercise proper supervision and control over

Private Heard, and that this negligence had been the cause of decedent's being murdered. It was further alleged that Private Heard had been convicted of a previous homicide while in the Army in Germany and that, because of this fact, among others, the Army should have known of Private Heard's dangerous propensities and should have taken steps to prevent him from harming others.

Defendant states two bases in support of its motion for summary judgment: (1) Plaintiff's cause of action is barred by the *Feres* doctrine; (2) Plaintiff's cause of action is barred by the intentional tort exception to the Federal Tort Claims Act.

The so-called "*Feres* doctrine" emanated from the United States Supreme Court's holding in *Feres* v. *United States*, 340 U.S. 135 (1950):

> [T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.

Id. at 146.[1] Relying on *Feres*, plaintiff argues that the "ultimate question" before this Court is "whether plaintiff's decedent, Vernon Shearer, was engaged in activity 'incident to his military service' at the time of his fa-

---

[1] The *Feres* doctrine applies in cases in which a personal repesentative brings an action under a state death statute which is not derivative in nature, but is an original and distinct cause of action granted to such individuals to recover damages sustained by them by reason of the wrongful death of the decedent. *See Harten* v. *Coons*, 502 F.2d 1363, 1365 (10th Cir. 1974), *cert. denied*, 420 U.S. 963 (1974); *De Font* v. *United States*, 453 F.2d 1239 (1st Cir.1972); *cert. denied*, 407 U.S. 910 (1972); *Siglar* v. *LeVan*, 488 F. Supp. 185, 190 (D.Md.1980); *Brackin* v. *United States*, (E.D.Pa. No. 79-1368), Memorandum and Order of Hannum, J., July 20, 1979; *Harrison* v. *United States*, 479 F. Supp. 529 (D. Conn. 1979); *Martin* v. *United States*, 404 F. Supp. 1240 (E.D.Pa. 1975); *Van Sickel* v. *United States*, 178 F. Supp. 791 (S.D.Cal. 1959), *aff'd*, 285 F.2d 87 (9th Cir. 1960).

tal injury." Plaintiff asserts that her claim is not barred by the *Feres* doctrine because decedent was on authorized leave from his military base at the time of his death and, therefore, his death was not incident to military service.

This Court is not persuaded by plaintiff's argument. The ultimate question is not whether decedent was engaged in activity incident to military service when he incurred his injuries. Rather, the "focus ... is upon *when and how the negligent act occurs*" and whether the negligent act was a part of activity incident to service. *Henning* v. *United States*, 446 F.2d 774, 777 (3d Cir. 1971) (emphasis added), *cert. denied*, 404 U.S. 1016 (1972).[2]

Upon application of the *Henning* analysis, this Court finds that plaintiff's action is barred by the *Feres* doctrine. The negligence alleged by plaintiff relates to activity of the United States Army incident to military service. Plaintiff alleges that the Army was negligent in failing to exert reasonable control over decedent's assailant, Private Heard, despite the fact that it had knowledge of Heard's dangerous propensities. We find that these allegations relate directly to decisions of military personnel made in the course of the performance of their military duty and, therefore, are barred by *Feres*

---

[2] The specific holding of *Henning* on this issue is as follows:

> This argument is erroneous for *Feres* does not limit its holding to injuries occurring in the course of activity incident to service. It also immunizes the Government for injuries arising out of activity incident to service. We think that *Feres* focuses not upon when the injury or when the claim becomes actionable, but rather the time of, and the circumstances surrounding the negligent act.... The focus is thus upon when and how the negligent act occurs.

Henning, 446 F.2d at 777.

and *Henning*.[3] *See Johnson* v. *United States*, 631 F.2d 34 (5th Cir. 1980), *cert. denied*, 449 U.S. 1083 (1981).

---

[3] The Third Circuit Court of Appeals recently explained the rationale underlying federal courts' refusal to scrutinize military decision-making in the context of an FTCA action:

> The primary rationale [for the *Feres* doctrine] was not advanced in Feres itself but in two subsequent decisions, *United States* v. *Brown*, 348 U.S. 110 (1954) and *United States* v. *Muniz*, 374 U.S. 150 (1963). Accordingly to these decisions, the immunity of the federal government from suit was "best explained" by
>
> > [t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits or discipline, and the extreme results that might obtain its suits under the Tort Claims Act were allowed for ... negligent acts committed in the course of military duty....
>
> *Brown*, 348 U.S. at 112. *Accord*, *Stencel Aero Engineering* v. *United States*, 431 U.S. at 671-72. Under this reasoning, suits for service injuries appear to have two consequences. The first is their effect on the willingness of military personnel to follow directions of their superiors. The Court in *Stencel*, a subsequent case based on *Feres*, observed that "the relationship between a sovereign and the members of its Armed Forces is unlike any relationship between private individuals." 431 U.S. at 670. Scrutinizing military decisions in civilian courts would "involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions." *Id.* at 673. As we noted in *Jaffee* I:
>
> > If claims for injuries sustained by members of the armed forces in the execution of military orders were subjected to the scrutiny of courts of justice, then the civil courts would be required to examine and pass upon the propriety of military decisions. The security and common defense of the country would quickly disintegrate under such meddling. "[A]ctions and essential military discipline would be impaired by subjecting the command to the public criticism and rebuke of any member of the armed forces who chose to bring suit against the United States."
>
> 592 F.2d at 717, *quoting Jefferson* v. *United States*, 178 F.2d 518, 519, 520 (4th Cir. 1949), *aff'd sub nom. Feres* v. *United States*, 340 U.S. 135 (1950).
>
> Suits for service injuries would also appear to have a related effect on the decision making of military authorities

Furthermore, the Court notes that its finding herein that *Feres* is a bar to plaintiff's claim does not leave plaintiff without remedy. A second basis of *Feres* is the existence of a no fault compensation scheme pursuant to the Veteran's Benefit Act. *Jaffee* v. *United States*, 663 F.2d 1226, 1235-38 (3d Cir. 1981), *cert. denied*, 102 S.Ct. 2234 (1982). The compensation scheme provided for in the Veteran's Benefit Act is the sole remedy for "service connected injuries." *Id. See Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977), in which the court held as follows:

> A compensation scheme such as the Veterans' Benefits Act serves a dual purpose: it not only provides a swift, eficient remedy for the injured serviceman, but it also clothes the Government in the "protective mantle of the Act's limiation-of-liability provisions." See *Cooper Stevedoring Co.* v. *Kopke, Inc.*, 417 U.S. 106, 115 (1974). Given the broad exposure of the Government, and the great variability in the potentially applicable tort law, see *Feres*, 340 U.S., at 142-143, the military compensation scheme provides an upper limit of liability for the Government as to service-connected injuries. To permit petitioner's claim would circumvent this limitation, thereby frustrating one of the essential

---

> who give orders. Military decisionmakers might not be willing to act as quickly and forcefully as is necessary, especially during battlefield conditions, if they know they will subsequently called into a civilian court to answer for their actions. While the Tort Claims Act would not make them personally liable in these circumstances, the prospect of adversarial civilian scrutiny might inhibit the exercise of militry discretion.

Jaffee v. *United States*, 663 F.2d 1226, 1232 (3d Cir. 1981).

We find that allowance of this suit would involve the same "[s]crutinizing [of] military decisions in civilian courts" that *Jaffee* warns against. *Id.* Consideration of this case would involve "second-guessing miliary orders, and would ... require members of the Armed Services to testify in court as to each other's decisions and actions." *Id.*

> features of the Veterans' Benefits Act. As we stated in a somewhat diffefent context concerning the Tort Claims Act: "To permit [petitioner] to proceed ... here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe that the [Federal Tort Claim] Act permits such a result." *Laird* v. *Nelms*, 406 U.S. 797, 802 (1972).

See also, *Hatzlachh Supply Co., Inc.* v. *United States*, 444 U.S. 460, 464-65 (1980), in which the Court stated as follows:

> Recognizing that the Veterans' Benefits Act provided compensation to injured servicemen, which we understood Congress intended to be the sole remedy for service-connected injuries, we declined to construe the Tort Claims Act to permit third-party indemnity suits that in effect would expose the Government to greater liability than that contemplated under the statutory compensation scheme. In *Stencel*, Congress had provided a remedy, which we thought to be exclusive. Here, however, § 2680(c) denies a tort remedy for certain claims; and we fail to see how the *Stencel* holding that the existence of an exclusive statutory compensation remedy negates tort liability supports the conclusion that if the Tort Claims Act bars a tort remedy, neither is there a contractual remedy.

Because the decedent was on active duty with the Army at the time of his death, plaintiff is entitled to receive the Veterans Administration benefits. *See* Exhibit "A", Docket entry No. 12.[4]

Accordingly, summary judgment will be entered in favor of defendant and against plaintiff.

An Order follows.

---

[4] Because we hold that *Feres* is a bar to plaintiff's claim, there is no need to address defendant's assertion that plaintiff's cause of action is barred by the intentional tort exception to the FTCA.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 82-0082

LOUISE SHEARER, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF
VERNON SHEARER, DECEASED

v.

UNITED STATES OF AMERICA

ORDER

AND NOW, this 27th day of December, 1982, upon consideration of defendant's Motion For Summary Judgment, and plaintiff's responses thereto, it is hereby ORDERED that defendant's Motion is GRANTED, plaintiff's Complaint is DISMISSED and judgment is entered thereon in favor of defendant and against plaintiff.

/s/ John B. Hannum

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1089

SHEARER, LOUISE, IND. AND AS ADMINISTRATRIX OF THE ESTATE OF SHEARER, VERNON, DECEASED

v.

UNITED STATES OF AMERICA C/O PETER F. VAIRA, U.S. ATTORNEY

LOUISE SHEARER, APPELLANT

ON APPEAL FROM
THE UNITED STATES DISRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA
(D.C. Civil No. 82-0082)

Present: GIBBONS, GARTH and HIGGINBOTHAM, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel October 24, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 29, 1982, be, and the same is hereby reversed and the cause remanded to the

said District Court for further proceedings consistent with the opinion of this Court.

ATTEST:

/S/ Sally Mrvos

SALLY MRVOS
Clerk

Dated: DECEMBER 19, 1983

Certified as a true copy and issued in lieu of a formal mandate on March 15, 1984.

TEST:

/S/ M. Elizabeth Ferguson

M. ELIZABETH FERGUSON
Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-1089

SHEARER, LOUISE, IND. AND AS ADMINISTRATRIX OF THE ESTATE OF SHEARER, VERNON, DECEASED, APPELLANT

v.

UNITED STATES OF AMERICA
C/O PETER F. VAIRA, U.S. ATTORNEY, APPELLEE

SUR PETITION FOR REHEARING IN BANC

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*.

The petition for rehearing filed by the United States of America, appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges in the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied. Judge Garth would grant the petition for rehearing for the reasons expressed in his panel dissent and in his statement that follows. Judge Adams would grant the petition for rehearing for the reasons expressed in his statement that follows. Judge Hunter and Judge Weis would grant the petition for rehearing.

BY THE COURT,

A. Leon Higginbotham, Jr.
Circuit Judge

Dated: MARCH 7, 1984

STATEMENT SUR DENIAL OF THE PETITION FOR REHEARING

GARTH, *Circuit Judge*

The petition for rehearing notes that the majority's disposition of the issue on this appeal can be expected to increase the number of suits brought against the United States, particularly since the majority's holding has erroneously construed the broad language of section 2680(h), 28 U.S.C. § 2680(h), the intentional tort exception to the Federal Tort Claims Act. Moreover, all of the other Courts of Appeals which have considered the issue presented here have held that 2680(h) bars recovery of claims similar to Shearer's, even if those claims are couched in terms of negligence. Indeed, a case (*United States* v. *Shively*, 345 F.2d 294 (5th Cir. 1965)) on which the panel majority relied to support its holding, i.e., that the exception does not pertain to Shearer, itself holds directly contrary to the panel's decision.

Shively holds expressly that Mrs. Shively, the victim (Sergeant Shively's recently divorced wife, whom the sergeant shot twice with a pistol before ending his own life), could not recover against the United States because her claim was a "claim arising out of assault" and thus was specifically excepted from recovery under 2680(h). *Id.* at 296-97. Additionally, *Shively* also concluded that the negligent issuance of a .45 caliber pistol by Army personnel to an off-duty sergeant in civilian clothes, in violation of Army regulations, was *not* the proximate cause of injury to Mrs. Shively, the sergeant's wife. Despite this explicit holding that 2680(h) barred any recovery from a claim arising out of an intentional assault, the panel majority was referred to *Shively* in a manner which can be read as supporting its holding. As I have pointed out, however, here and in the panel dissent, *Shively's* holding is completely contrary to the panel majority's decision in this case. Thus, if for no other reason than to clear up a potential jurisprudential murkiness that surrounds the panel majority's holding in this important area of claims made under the Federal Tort Claims Act, I believe this case should receive the attention of the court as a whole.

For these reasons as well as the other reasons expressed in the panel dissent, and because there is a need for uniform construction and application of a congressional policy that has been expressed so strongly by statutory mandate (28 U.S.C. § 2680(h)), I believe en banc consideration is merited.

Thus, I vote to grant the Government's petition for rehearing of this appeal.

Statement Sur Denial of Petition for Rehearing

ADAMS, *Circuit Judge*

In my mind, the majority opinion in this case decides two questions of exceptional importance that deserve *in banc* consideration. The panel's affirmative answer to the first question, whether the intentional tort exception to the Federal Torts Claims Act, 28 U.S.C. 2680(h), allows a claim against the government for a murder committed by an off-duty serviceman, brings this Court into conflict with the law of several other Circuits. *See, e.g., Wine* v. *United States*, 705 F.2d 366 (10th Cir. 1983); *Hughes* v. *United States*, 662 F.2d 219 (4th Cir. 1981). The panel's negative answer to the second question, whether the *Feres* doctrine precludes the kind of litigation that underlies this appeal, raises serious policy concerns about judicial review of military decisions. *See Feres* v. *United States*, 340 U.S. 135 (1980).

Because of the importance of the questions addressed on appeal and because of the tension that now exists among the circuits, I believe that reconsideration *in banc* would be both appropriate and salutary.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Office - Supreme Court, U.S.
FILED
OCT 6 1984
ALEXANDER L. STEVAS
CLERK

No. 84-194

In The

Supreme Court of the United States

October Term, 1984

UNITED STATES OF AMERICA,

Petitioner,

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WILLIAM T. CANNON, ESQUIRE
Suite 1500 Robinson Building
42 South Fifteenth Street
Philadelphia, Pennsylvania 19102
(215) 564-4449

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS PRESENTED

1. Whether the survivor of a serviceman who was murdered by a fellow serviceman, while both were off duty and off the military reservation in another state off base, may sue the government for damages under the Federal Tort Claims Act, notwithstanding the intentional tort exception, where military personnel are on notice concerning the offending serviceman's dangerous propensities and were negligent in failing to remove him from the military, supervise his activities, or warn persons in the positon of plaintiff's decedent of his propensities.

2. Whether such a suit, alleging that negligence on the part of the serviceman's superior officers and Department of the Army civilians caused the death of plaintiff's decedent, is precluded by the doctrine of *Feres v. United States,* 340 U.S. 135 (1950), which bars suits by servicemen for torts incident to military service.

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Statement	3
Statement in Opposition to Petition	7
Conclusion	14

TABLE OF AUTHORITIES

CASES:

Feres v. United States, 340 U.S. 135 (1950) 5, 6, 12, 13

Gibson v. United States, 457 F.2d 1391 (3rd Cir. 1972) 7

Harten v. Coons, 502 F.2d 1363 (10th Cir. 1974), Cert. denied, 420 U.S. 977 (1975) 13, 14

Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980) 6

Hicks v. United States, 511 F.2d 407 (D.C. Cir. 1975) 8, 12

Hughes v. Sullivan, 514 F.Supp. 667 (E.D. Va. 1980) 9

Hughes v. United States, 662 F.2d 219 (4th Cir. 1981) 9

Jaffe v. United States, 663 F.2d 1226 (3rd Cir. 1981) 12, 13

Liuzzo v. United States, 508 F.Supp. 1030 (D.C. Mich. 1981) 11

TABLE OF AUTHORITIES—Continued

	Page
Naisbitt v. United States, 611 F.2d 1350, cert. denied, 449 U.S. 885 (1980)	9
Panella v. United States, 316 F.2d 622 (2d Cir. 1954)	11
Parker v. United States, 611 F.2d 1007 (5th Cir. 1980)	13, 14
Rodgers v. United States, 397 F.2d 12 (4th Cir. 1968)	8
Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977)	6, 12
Underwood v. United States, 356 F.2d 92 (5th Cir. 1966)	8, 12
United States v. Brown, 348 U.S. 110 (1954)	12, 13
United States v. Shively, 345 F.2d 294 (5th Cir. 1965)	9
White v. United States, 317 F.2d 13 (4th Cir. 1963)	14
Woodside v. United States, 606 F.2d 134 (6th Cir. 1979), cert. denied, 445 U.S. 904 (1980)	13

STATUTES:

Federal Tort Claims Act:

28 U.S.C. 1346(b)	2, 4
28 U.S.C. 2671 et seq.	3
28 U.S.C. 2680	3, 4, 6
28 U.S.C. 2680(h)	5, 7, 8, 10, 11

MISCELLANEOUS:

Restatement (Second) of Torts (1965)	11

No. 84-194

In The

Supreme Court of the United States

October Term, 1984

UNITED STATES OF AMERICA,

Petitioner,

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

William T. Cannon, Esquire, on behalf of Louise Shearer, Individually and as Administratrix for the Estate of Vernon Shearer, Deceased, Respondent, answers to the United States Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals (Petitioner's App. 1a-23a) is reported at 723 F.2d 1102. The statements on denial of rehearing (Petitioner's App., infra, 33a-36a) are reported at 729 F.2d 266. The Opinion of the District Court (Petitioner's App., 24a-29a) is reported at 576 F. Supp. 672.

JURISDICTION

The judgment of the court of appeals (Petitioner's 31a-32a) was entered on December 19, 1983. A petition for rehearing was denied on March 7, 1984 (Petitioner's App., 33a-36a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

28 U.S.C. 1346(b) provides in part:

> Subject to the provisions of [28 U.S.C. 2671-2680], the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2680 provides in part:

> The provisions of this chapter and section 1346 (b) of this title shall not apply to—
>
> * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

STATEMENT

1. Respondent is the mother and administratrix of a serviceman, Private Vernon Shearer, who was stationed at Fort Bliss, Texas. While Shearer was on authorized leave and off the base, he was kidnapped and murdered by another serviceman, Heard, who was also stationed at Fort Bliss and was also off duty at the time. This crime occurred in Otero County, New Mexico, which is adjacent to Fort Bliss. (Petitioner's App., 2a-3a; C.A. App. 5a, 22a). Heard was subsequently convicted of mur-

der in a New Mexico state court and sentenced to a term of 15 to 55 years' imprisonment (C.A. App 16a).

Respondent subsequently brought this action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 et seq., seeking damages from the United States. She claimed that the Army's negligent failure to prevent Heard from murdering Shearer was responsible for Shearer's death. Specifically, respondent alleged (C.A. App. 17a-18a; Complaint paras. 40-41):[1]

> 40. The United States Government, acting through its Department of the Army, * * * negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard, to take any action to prevent him from endangering other persons, in spite of the defendant's knowledge of his dangerous murderous propensities, and further failed to warn other persons that he was at large, and of the danger which he presented.
>
> 41. The United States Government, acting through its Department of the Army, * * * negligently and carelessly failed to then remove Andrew Heard from active military duty, in spite of its knowledge of his dangerous and murderous propensities, with a reasonable degree of promptness given the great danger potential that he posed to other active duty service members, including [Shearer], none of whom was warned of the dangers posed.

Respondent asserts that in 1977, while Heard was assigned to an Army base in Germany, he was convicted by a German court of manslaughter and sentenced to a four-year prison term. In February 1979, when German au-

[1] "Complaint" refers to the Proposed Amended Complaint (C.A. App. 11a-18a). "C.A. App." refers to the Appendix to Appellant's Brief in the Court of Appeals.

thorities granted Heard an early release from that term, the Army promptly removed him from Germany and transferred him to Fort Bliss. By the time Heard killed Shearer, in June of 1979, the Army had initiated proceedings to have Heard discharged (C.A. App. 13a-15a).

2. The United States District Court for the Eastern District of Pennsylvania granted summary judgment in favor of the government (Petitioner's App., infra 24a-30a). The district court did not address the government's contention that respondent's claim is barred by 28 U.S.C. 2680(h), the intentional tort exception to the FTCA which provides in part that the government is not liable for "[a]ny claim arising out of assault [or] battery * * *." (See Petitioner's App. 29a n.4). Instead, the court held that respondent's claim is precluded by *Feres v. United States*, 340 U.S. 135 (1950), which held that a serviceman may not sue the government under the FTCA for alleged torts incident to military service.

The district court stated that under Feres, the "question is not whether decedent was engaged in activity incident to military service when he incurred his injuries. Rather, the 'focus . . . is upon when and how the negligent act occurs'" (Petitioner's App., 26a) (citation and emphasis omitted)). The court reasoned that because respondent [allege[d]] that the Army was negligent in failing to exert "reasonable control over" Heard, respondent's claims "relate directly to decisions of military personnel made in the course of the performance of their military duty and, therefore, are barred by *Feres* (ibid.). The district court also noted that respondent is entitled to receive veterans' benefits (id. at 29a) and explained that "the existence of a no fault compensation scheme" for

servicemen, veterans, and their survivors is another reason to apply the *Feres* doctrine (Petitioner's App., infra, 28a-29a, citing *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 673 (1977), and *Hatzlachh Supply Co. v. United States,* 444 U.S. 460, 464-465 (1980).

3. A divided panel of the court of appeals reversed (Petitioner's App., 1a-23a). The majority overturned the district court's ruling that *Feres* bars respondent's claim explaining that "[g]enerally, an off-duty serviceman not on the military base and not engaged in military activity at the time of injury, can recover under FTCA" (Petitioner's App., 5a-6a) and that "being kidnapped off base at gun point can never be perceived as one of the activities or anticipated • • • benefits of being in the armed services" (id. at 7a (emphasis omitted)).

The Court also held that the intentional tort exception to the FTCA does not bar respondent's claim. The majority noted that respondent's complaint alleged that the government was negligent and reasoned that "if an assault and battery occurred as a 'natural result' of the government's failure to exercise due care, the assault and battery may be deemed to have its roots in negligence and therefore it is within the scope of the FTCA" (Petitioner's App., infra, 8a).

Judge Garth dissented (Petitioner App., 10a-23a). He noted his disagreement with the majority on the *Feres* issue (Petitioner's App., 11a & n.1), but principally discussed the intentional tort exception. Judge Garth noted that Section 2680(a) applies to claims "arising out of" assault or battery and not just claims "for" assault or battery (see App., infra, 13a-14a) and accordingly, by its terms, precludes respondent's claim.

The Court of Appeals denied rehearing en banc by a vote of 6-4 (Petitioner's App., 33a-36a). Judges Garth and Adams wrote dissenting statements.

Statement In Opposition To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

The Court of Appeals holding that the Intentional Tort Exception to the Federal Tort Claims Act does not bar respondent's claim is fully in accord with the language and the manifest purposes of this provision and does not conflict with the decisions of other Federal Courts of Appeal that have considered the issue. Contrary to the government's fears, the Court of Appeals' decision does not impose a new duty on the government and the approach adopted by the Court will not result in the opening of the proverbial floodgates.

Additionally, the Court of Appeals' holding that the *Feres* doctrine does not bar respondent's claim was not error since, under the unique facts of this case, "second guessing" of the decisions of military officers will not result. Further review is therefore unwarranted.

1A. The Court of Appeals' principle holding, that the Intentional Tort Exception to the Federal Tort Claims Act, 28 U.S.C. Section 2680(h), does not bar respondent's claim is fully consistent with the decisions of other courts of appeal that have considered this issue.

In *Gibson v. United States,* 457 F.2d 1391 (3rd Cir. 1972), a corporate employee, who had been hired to train Job Corps enrollees, one of whom was a juvenile delinquent with a known addiction to narcotics, was assaulted while engaged in the performance of his duties. In plain-

tiff's complaint he alleged that the injury arose out of the basic negligence of the United States in that the attack was the foreseeable consequence of the original misconduct. The Court ruled that the matter was not controlled by the intentional tort exception of the FTCA and stated: . . . [t]he attack upon Gibson was a foreseeable consequence of the Government's failure to exercise due care under the circumstances and, therefore, it is not such an intervening act as will sever the negligence and the appellant's injuries.

In *Hicks v. United States,* 511 F.2d 407 (D.C. Cir. 1975), liability was imposed on a government hospital when it failed to inform a court of the actual condition of a patient it intended to release. The patient, after being released, shot and killed his wife, an act termed foreseeable.

In *Rodgers v. United States,* 397 F.2d 12 (4th Cir. 1968), plaintiff, a probationer, was subjected to torture by a man of unsavory reputation to whom he was exposed at night during a period in which a marshal was ordered by the Court to provide plaintiff with transportation to his home. The Court ruled that 28 U.S.C. Section 2680(h) was inapplicable: "If there is a valid claim here, it is founded on negligence even though assault and or false imprisonment may be collaterally involved."

In *Underwood v. United States,* 356 F.2d 92 (5th Cir. 1966), liability was imposed on the government for failing

to take precautions which allowed a mentally ill airman to obtain possession of a firearm which he used to kill his former wife. The government's contention that the action brought on behalf of plaintiff's decedent was barred by the intentional tort exception of the Federal Tort Claims Act was specifically rejected.

The authorities relied on by the government in support of its request for review are readily distinguishable. In *Naisbitt v. United States,* 662 F.2d 1350, cert denied, 449 U.S. 885 (1980); *Hughes v. United States,* 662 F.2d 219 (4th Cir. 1981), aff'g *Hughes v. Sullivan,* 514 F.Supp. 667 (E.D. Va. 1980); and *United States v. Shively,* 345 F.2d 294 (5th Cir. 1965), the causes of action were directly based on the commission of a deliberate assault and battery. Only through artful pleading were the litigants able to couch their causes of action in terms of negligence. Most importantly, there was a total absence of facts in these cases to suggest that the government knew or should have known either of the prior violent actions by the assailants or of the assailant's potential violence.

Respondent, herein, has alleged facts which, if proven, would permit a court to find that the government had knowledge of the violent propensities of the killer of plaintiff's decedent. The following facts are critical: Heard had been convicted and imprisoned for killing a civilian while in the Army. He was released from the prison less than four months prior to killing Shearer. Several months before Shearer was murdered, high ranking military officers, aware of Heard's violent disposition, recommended his discharge. Nevertheless, Heard remained in the Army and was treated as a member in good standing. Despite Heard's previous murder and the

Army's knowledge of his disposition, enlisted men, including Shearer, were not warned about his violent past or present disposition.

1B. The Court of Appeals' decision is not inconsistent with the language and the purposes of the intentional tort exception. While section 2680(h) bars "[a]ny claim arising out of assault [or] battery," this phrase has been interpreted not to bar a cause of action which is based on specific facts which, if proven, demonstrate that the government should have reasonably anticipated that one of their employees would commit an intentional tort. As Mr. Justice Higginbotham stated in his majority Opinion in this matter, "[f] or example, if an assault and battery occurred as a 'natural result' of the government's failure to exercise due care, the assault and battery may be deemed to have its roots in negligence and therefore it is within the scope of the FTCA." (Petitioner's App., 8a).

Furthermore, imposing liability on the government in this matter does not run afoul of congressional intent in enacting the FTCA. The government contends that " . . . if Congress meant to bar claims based on the intentional torts of government employees acting within the scope of their duties, it could not possibly have intended that the government be responsible for intentional torts committed by employees who were acting outside the scope of their duties and were therefore even less subject to the government's supervision and control" (footnote omitted), (Petitioner's Writ of Certiorari to the United States Court of Appeals for the Third Circuit, 10).

The Government misinterprets Respondent's cause of action. This action is not based on the commission of

an intentional tort by a government employee. Rather, the action is premised on the failure of Government officials to separate Private Heard from military service once they learned that he was unfit for such service. The Government's argument has been considered by a number of courts and specifically rejected. In *Panella v. United States,* 216 F.2d 622 (2d Cir. 1954), a federal inmate's tort claim for injuries sustained from an assault by another inmate, but allegedly occasioned by the negligence of employees of the government, was held not to be barred by section 2680(h): "For in the present case the only basis of liability against the Government is the negligence of its employees, not their deliberate torts, since the assailant was not a government employee . . . In this case, however, a negligence action is not merely an alternative form of remedy for assault, but negligence is rather the essence of plaintiff's claim." See also, *Liuzzo v. United States,* 508 F.Supp. 1030 (D.C. Mich. 1981) ("In this case the 'essence' of their claims does not change merely because the assault may have been committed by a government employee").

Additionally, imposition of liability on the government in this matter does not create a "novel form of liability" (Petitioner's Writ of Certiorari to the United States Court of Appeals, 10). Under Restatement of Torts Second, 448 (1965), page 480:

> "The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have real-

ized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime."

A cause of action premised on this provision is hardly novel. *Hicks v. United States,* supra; *Underwood v. United States,* supra, and *Fair v. United States.*

2. The Court of Appeals did not err in holding that the *Feres* doctrine does not bar Respondent's claim. First, the Government unduly focuses on the status and activity of the negligent parties, military personnel, without considering the status and activity of the injured party, Plaintiff's decedent, Vernon Shearer. *Feres* insulates the military from FTCA suits arising out of "negligent orders given or negligent acts committed in the course of" an injured serviceman's military duty. *Stencel Aero Engineering Corp. v. United States,* 431 U.S. at 671; *United States v. Brown,* 348 U.S. 110, 112 (1954); *Feres v. United States,* 340 U.S. at 146; *Jaffe v. United States,* 663 F.2d at 1233.

These terms "in the course of" and "incident to", however, are not self-evident truths that leap out to illuminate any factual situation. Consequently, courts must probe beneath these conclusionary statements and must identify more specific facts to determine whether an injury or death was sustained in the "course of" or "incident to" one's military service. Application of the doctrine focuses on the relationship between the serviceman and the military at the time and place the injury was sustained. The status and activity of the injured serviceman often seem to be the controlling factors. The important distinguishing factors to be accounted for are: the status of the injured soldier at the time of injury, the place of the injury,

the nature of the activity engaged in, and whether the injured party was acting under orders or compulsion. These factors control *Feres* doctrine cases. *United States v. Brown,* 348 U.S. at 112; *Feres v. United States,* 340 U.S. at 146; *Jaffe v. United States,* 663 F.2d at 1232. See also, *Parker v. United States,* 611 F.2d 1007, 1013-15, (5th Cir. 1980), *Woodside v. United States,* 606 F.2d 134, 138-42 (6th Cir. 1979), cert denied, 445 U.S. 904 (1980); *Harten v. Coons,* 502 F.2d 1363, 1365 (10th Cir. 1974), cert denied, 420 U.S. 977 (1975). Merely focusing on the status and activity of the allegedly negligent parties is both inappropriate and not in accord with the case law interpreting *Feres.*

The Court of Appeals appropriately concluded: "Although receiving medical treatment in military hospitals may be considered an activity and benefit incident to military service and therefore barred under *Feres,* certainly being kidnapped off base at gun point can never be perceived as one of the activities or anticipated free benefits of being in the armed services. Thus, there is no legitimate basis on which *Feres* can bar appellant's claim."

Moreover, maintenance of the instant cause of action is not an attempt to "second-guess" military decisions. Such an argument may have merit when decisions are called into question concerning the appropriateness and conduct of wartime conditions. See *Jaffe v. United States,* supra.

Respondent attacks not the formulation standards to judge the fitness of applicants to the military forces of this country, nor the standards governing the retention of service members in the military, but the specific failure to remove Heard from active duty using existing pro-

cedural remedies available to it during the almost three years that Heard served in prison for bludgeoning a German woman to death while on active duty in that country, or during the better than four months following Heard's release from prison when he was continued as a member of the active Army before taking Shearer's life. In *Gibson v. United States,* supra, the Court of Appeals for the Third Circuit explained clearly that "'application of . . . policy to the individual case is an administrative decision at the operational level which, if negligently done, will make the Government liable . . .", quoting *White v. United States,* 317 F.2d 13, 17 (4th Cir. 1963).

Finally, permitting Respondent's suit will have no effect on military discipline. This is so since the murder of Shearer occurred off the military base while the actors were not involved in service-connected activity. A suit by one on leave from a military base to attend to his personal affairs, while under no military supervision, will not interfere with military discipline. *Parker v. United States,* supra. *Harten v. Coons,* 502 F.2d 1363 (10th Cir. 1974). The question which must be asked is: Was plaintiff's decedent performing duties such as to undermine traditional concepts of military discipline if he were permitted to maintain a civil suit for injuries resulting therefrom? The answer is clearly no.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM T. CANNON

Attorney for Respondent

Office-Supreme Court, U.S.
FILED
OCT 18 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-194 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

7pp

TABLE OF AUTHORITIES

Page

Cases:

Fair v. *United States*, 234 F.2d 288 ..... 1, 2

Feres v. *United States*, 340 U.S. 135 3

Gibson v. *United States*, 457 F.2d 1391 ..... 1, 2

Hicks v. *United States*, 511 F.2d 407 ..... 1, 2

Hughes v. *United States*, 662 F.2d 219, aff'g *Hughes* v. *Sullivan*, 515 F. Supp. 667 ..... 2, 3

Naisbitt v. *United States*, 611 F.2d 1350, cert. denied, 449 U.S. 885 ..... 2, 3

Panella v. *United States*, 216 F.2d 622 ..... 1, 2

Rogers v. *United States*, 397 F.2d 12 1

Underwood v. *United States*, 356 F.2d 92 ..... 1, 2

United States v. *Shively*, 345 F.2d 294 ..... 2, 3

Wine v. *United States*, 705 F.2d 366 2

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-194

UNITED STATES OF AMERICA, PETITIONER

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

---

1. Respondent relies on a series of decisions — *Hicks* v. *United States*, 511 F.2d 407 (D.C. Cir. 1975); *Gibson* v. *United States*, 457 F.2d 1391 (3d Cir. 1972); *Rogers* v. *United States*, 397 F.2d 12 (4th Cir. 1968); *Underwood* v. *United States*, 356 F.2d 92 (5th Cir. 1966); *Fair* v. *United States*, 234 F.2d 288 (5th Cir. 1956); and *Panella* v. *United States*, 216 F.2d 622 (2d Cir. 1954) — in which, respondent asserts, a negligent failure by the government to supervise a person it knew to be dangerous was held to be actionable under the Federal Tort Claims Act. See Br. in Opp. 7-9, 11, 12. As we explained in the petition (Pet. 12-13 n.6), these cases rest on the principle that when the government undertakes a special responsibility for protecting the public from a person known to be dangerous — such as a prisoner (in *Rogers*) or a dangerous patient in a mental hospital (in

Hicks, Underwood, Fair, and *Panella*) — it must exercise due care in discharging that responsibility. None of these cases suggests that the government is responsible for supervising the off-duty activities of civilian or military employees generally.

Indeed, several of the cases cited by respondent are from the Fourth and Fifth Circuits, which have specifically adopted the position we urge here — that the government may not be held liable under the FTCA for the off-duty torts of its employees. See *Hughes* v. *United States,* 662 F.2d 219 (4th Cir. 1981), aff'g *Hughes* v. *Sullivan,* 514 F. Supp. 667 (E.D. Va. 1980); *United States* v. *Shively,* 345 F.2d 294 (5th Cir. 1965). Moreover, as Judge Garth pointed out in his dissenting opinion below, in *Gibson* the Third Circuit itself was careful to confine its holding to cases in which the government accepted responsibility for protecting the public from persons known to be dangerous. See Pet. App. 19a-20a.

2. Respondent, like the court of appeals, attempts to distinguish the cases that conflict with the decision below — *Hughes* v. *United States, supra; United States* v. *Shively, supra; Naisbitt* v. *United States,* 611 F.2d 1350 (10th Cir.), cert. denied, 449 U.S. 885 (1980); and *Wine* v. *United States,* 705 F.2d 366 (10th Cir. 1983) — by asserting that "there was a total absence of facts in these cases to suggest that the government knew or should have known either of the prior violent actions by the assailants or of the assailant's potential violence" (Br. in Opp. 9). As we demonstrated in the petition (Pet. 9), these cases cannot be distinguished in this fashion. In *Hughes,* the complaint alleged that the government employee whose off-duty acts damaged the plaintiff had previously engaged in precisely the same kind of behavior, and that the government had refused a request that the employee be assigned to a new position in which he would be less likely to injure members

of the public. See 662 F.2d at 219-220. In *Shively,* not only was there a sufficient allegation that the government was negligent in its supervision of the off-duty serviceman, but the district court ruled that the government was liable, and the court of appeals specifically agreed that the government's "negligence * * * was the proximate cause of the plaintiff's injury" (345 F.2d at 296). The court of appeals nevertheless held that the intentional tort exception to the FTCA barred the plaintiff's claim (*id.* at 297). In *Naisbitt,* the court of appeals noted that the plaintiff had alleged that "it was reasonably foreseeable" by the government that the off-duty serviceman who injured the plaintiffs "would, unless restrained, perpetrate serious injuries" (611 F.2d at 1351); the court of appeals nowhere suggested that this complaint, which was dismissed, was inadequate because it did not allege supporting facts with sufficient detail or specificity. In *Wine,* the government admitted, for purposes of its motion to dismiss, the facts underlying the plaintiff's claim of negligent supervision; the court of appeals affirmed the dismissal of the complaint on the ground that it was barred by the intentional tort exception.

3. Although respondent contends that "maintenance of the instant cause of action is not an attempt to 'second guess' military decisions" (Br. in Opp. 13), respondent's description of her suit belies this claim. Respondent concedes that her cause of action "is premised on the failure of Government officials to separate Private Heard from military service once they learned he was unfit for such service" (Br. in Opp. 11) and "attacks * * * the specific failure to remove Heard from active duty" (Br. in Opp. 13). These allegations constitute a direct challenge on behalf of the injured serviceman to military decision-making — how long a serviceman should serve, where he should serve, and in what capacity — and are precisely the sort of claim that is barred by *Feres.*

For these reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

OCTOBER 1984

Office - Supreme Court, U.S.
FILED
DEC 11 1984
ALEXANDER L. STEVAS,
CLERK

(4)

No. 84-194

In the Supreme Court of the United States

October Term, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

WILLIAM T. CANNON
Robinson Building
Suite 1500
42 South 15th Street
Philadelphia, Pennsylvania 19102
(215) 564-4449
Counsel for Respondent

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Petitioner

PETITION FOR WRIT OF CERTIORARI FILED AUGUST 2, 1984
CERTIORARI GRANTED OCTOBER 29, 1984

19pp

TABLE OF CONTENTS*

	Page
District Court Docket Entries	1
Summons and Complaint, fieed March 4, 1982	4
Defendant's Answer, filed May 4, 1982	7
Plaintiff's Proposed Amended Complaint	9
Declaration of Bruce Kasold, dated April 28, 1982 .	15
Order granting certiorari	16

*Opinions and orders of the district court and the court of appeals (including the panel opinion and dissent, and the statements filed on denial of rehearing) are attached to the petition for certiorari.

DISTRICT COURT DOCKET ENTRIES

LOUISE SHEARER, IND., AND AS ADMINISTRAIX
THE ESTATE OF SHEARER, VERNON, DECEASED

v.

UNITED STATES OF AMERICAN
C/O PETER F. VAIRA
U.S. ATTORNEY

1982	
Jan. 7	Complaint filed.
Jan. 7	Summons exit (mailed to person)
Jan. 7	MOTION AND ORDER APPOINTING AARON SHEARER TO SERVE SUMMONS AND COMPLAINT UPON DEFT, FILED.
	1-8-82 Entered and Copies mailed.
Mar. 9	Appearance of Alexander Ewing, Jr., for United States of America, filed.
Mar. 17	Report of Pre-trial Conference, filed.
Mar. 30	Plff's First Set of Interrogatories, Certificate of Service, filed.
Apr. 2	Plff's First Request for Production of Documents from United States of America, Certificate of Service, filed.
Apr. 28	Deft's Answers to Plff's Interrogatories, filed.
Apr. 28	Deft's Response to Request for Production of Documents, filed.
Apr. 29	PLFF'S MOTION FOR ORDER UNDER RULE 37(a) AND (b) COMPELLING DEFT TO MAKE DISCOVERY AND IMPOSING SANCTIONS, NOTICE, MEMO, CERTIFICATE OF SERVICE, FILED.
May 3	PLFF'S MOTION FOR ADDITIONAL TIME IN WHICH TO FILE AMENDED COMPLAINT, NOTICE, CERTIFICATE OF SERVICE, FILED.
May 3	Deft's Answer to Plff's Motion to Compel Discovery, Memo, Certificate of Service, filed.

May 4 DEFT'S MOTION FOR SUMMARY JUDGMENT, NOTICE, MEMO CERTIFICATE OF SERVICE, FILED.

May 4 Deft's Answer, Certificate of Service, filed.

May 4 ISSUE JOINED.

May 4 Deft's Praecipe to file the attached Declaration as an attachment to Deft's Answers to Interrogatories which were filed with the Court on April 28, 1982, Declaration, Certificate of Service, filed.

May 4 PLFF's MOTION FOR ORDER COMPELLING DEFT. UNITED STATES OF AMERICA TO MAKE DISCOVER NOTICE, MEMO, CERTIFICATE OF SERVICE, FILED.

May 13 ORDER THAT PLFF'S MOTION TO COMPEL DISCOVERY ARE GRANTED IN PART, DENIED IN PART, ETC. PLFF'S MOTION FOR SANCTION IS DENIED, FURTHER ORDERED THAT PLFF IS TO FILE ITS ANSWER TO DEFT'S MOTION FOR SUMMARY JUDGMENT ON OR BEFORE MAY 21, 1982, ETC. FILED.

5/14/82 Entered and Copies mailed.

May 21 Plff's Answer to Deft's Motion for Summary Judgment, filed.

May 21 Plff's Memorandum of Law in Support of Plff's Answer to Deft's Motion for Summary Judgment, filed.

June 11 Deft's Reply Memorandum of Law in Support of Its Motion for Summary Judgment, Certificate of Service, filed.

Dec. 15 Withdrawal of Appearance of Alexander Ewing, Jr., AUSA, appearance of Margaret L. Hutchinson, AUSA, for deft., filed.

Dec. 21 Plff's memorandum response to deft's reply memorandum of law in support of its motion for summary judgment, filed.

Dec. 28 MEMORANDUM OAN ORDER THAT PLFF'S COMPLAINT IS DISMISSED AND JUDGMENT IS ENTERED IN FAVOR OF DEFT. AND AGAINST PLFF., FILED.

12/29/82 Entered & Copies mailed.

1983

Feb. 4 PLFF'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, STATEMENT IN SUPPORT, FILED.

Feb. 4 Plff's notice of appeal, filed. (83-1089)

2/7/83 Copies to: U.S.C.A., Margaret L. Hutchinson, Esq.

Feb. 4 Copy of Clerk's notice to U.S.C.A., filed.

Feb. 15 Affidavit of William T. Cannon, Esq. re: served plff's appeal to U.S. Court of Appeals on 2-10-83, filed.

Feb. 28 Gov't memorandum in opposition to motion to proceed in forma pauperis, cetificate filed.

Mar. 8 Transcript purchase order, filed.

Mar. 8 RECORD COMPLETE FOR PURPOSES OF APPEAL.

Mar. 10 ORDER DATED 3-8-83 THAT PLFF-APPELLANT'S MOTION TO PROCEED IN FORMA PAUPERIS IS GRANTED; MOTIONS TO EXCUSE THE FILING OF THE DISTRICT COURT RECORD & FOR REIMBURSEMENT FOR EXPENSES IN THE REPRODUCTION OF APPELLATE BRIEFS ARE DENIED, FILED.

3/11/83 Entered & Copies mailed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

82-0610
Civil Action File No. 82-0082

LOUISE SHEARER, IND. AND AS ADMINISTRATRIX
OF THE ESTATE OF VERNON SHEARER, DECEASED,
PLAINTIFF

v.

UNITED STATES OF AMERICA
C/O PETER F. VARIA
U.S. ATTORNEY, DEFENDANT

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon LOUISE SHEARER plaintiff's attorney, whose address 7811 Woolston Ave., Phila. Pa. 19150, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

/s/ _____
MICHAEL E. KUNZ
Clerk of Court

Date: JANUARY 7, 1982
NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 82-0082

LOUISE SHEARER, IND. AND AS
ADMINISTRATRIX OF THE ESTATE OF VERNON SHEARER,
DECEASED
7811 WOOLSTON AVENUE PHILADELPHIA, PA 19150

v.

UNITED STATES OF AMERICA
C/O PETER F. VAIRA
U.S. ATTORNEY
3310 U.S. COURT HOUSE
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC

COMPLAINT

1. This action is brought under the Federal Tort Claim Act 28 U.S.C. §1346(b) and §2671 et seq., as hereafter more fully appears.

2. Plaintiff is a citizen of the United States.

3. Plaintiff is the parent of Vernon Shearer, Deceased, and is the duly appointed Administratrix of the Estate of Vernon Shearer, Deceased, having been so appointed by the Orphans' Court of Philadelphia County, Pennsylvania. She brings this action on her own behalf and on behalf of all those entitled to share in the proceeds of any recovery arising from the death of Vernon Shearer, and is authorized to bring this action on their behalf.

4. A timely claim was filed with the Department of the Army which was denied by letter dated July 8, 1981.

5. On or about June 2, 1978, Vernon Shearer, in the vicinity of Ft. Bliss, Texas, was accosted by one Andrew Heard, a private in the United States Army, kidnapped and murdered, the kidnapping and murder taking place someplace within the confines of the Ft. Bliss Military Reservation or the adjacent Otero County, of New Mexico.

6. At the time of the kidnapping and murder, Andrew Heard had previously been known to have killed another individual, and had been convicted of that homicide, and was known by the United States Army to be dangerous and of a murderous disposition. Nevertheless he was permitted to remain at liberty and free of any restraints, supervision, constraints or control.

7. The United States Government, acting through its Department of the Army, and its duly authorized agents, servants and employees, negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard, or take any action to prevent him from endangering other persons, in spite of the defendant's knowledge of his dangerous and murderous propensities, and further failed to warn other persons that he was at large, and of the danger which he presented.

8. Solely as a result of the aforesaid, plaintiff brings this action under the Wrongful Death Acts of Pennsylvania and all other applicable jurisdictions, and under the Survivor Act of Pennsylvania, where Vernon Shearer was domiciled, and seeks such other damages as may legally be recovered as a result of or arising from the death of Vernon Shearer.

WHEREFORE, plaintiff demands judgment against the defendant in an amount in excess of Fifty Thousand ($50,000.00) Dollars plus costs.

/s/ _____

LOUISE SHEARER,
Individually and as Administratrix of the Estate of Vernon Shearer, deceased

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 82-0082

LOUISE SHEARER, IND. AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

ANSWER

Defendant, United States of America, by its attorneys, Peter F. Vaira, United States Attorney in and for the Eastern District of Pennsylvania, and Alexander Ewing, Jr., Assistant United States Attorney in and for the same District, hereby responds to the numbered paragraphs of the Complaint as follows:

FIRST DEFENSE

1. & 2. Admitted.

3. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3; hence they are deneid.

4. Admitted.

5. Admitted, with the proviso that the murder occurred in Otero County, New Mexico.

6. The allegations contained in the first sentence of paragraph 6 are admitted, except it is denied that the Army knew that Andrew Heard was "dangerous" or "of a murderous disposition." Defendant does not completely understand the allegations contained in the second sentence of paragraph 6; hence they are denied.

7. & 8. Denied.

SECOND DEFENSE

9. Plaintiff's Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

10. This Court lacks subject matter jurisdiction over this action.

FOURTH DEFENSE

11. Plaintiff's injuries, if any, were caused in whole or in part by plaintiff's own negligence.

FIFTH DEFENSE

12. Plaintiff voluntarily assumed the risk of any injuries plaintiff suffered.

SIXTH DEFENSE

13. Plaintiff's injuries, if any, were not caused by any negligent act or omission of any employee of defendant.

WHEREFORE, defendant requests the Court dismiss plaintiff's Complaint.

RESPECTFULLY SUBMITTED,
PETER F. VAIRA
United States Attorney

/s/ _____
ALEXANDER EWING, JR.
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 82-0082

LOUISE SHEARER, IND., AND AS
ADMINISTRATRIX FOR THE ESTATE
OF VERNON SHEARER, DECEASED, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

PLAINTIFF'S PROPOSED AMENDED COMPLAINT

1. This action is brought under the Federal Tort Claims Act 28 U.S.C. Section 1346(b) and Section 2671 et seq., as hereafter more fully appears.

2. Plaintiff is a citizen of the United States.

3. Plaintiff is the parent of Vernon Shearer, Deceased, and is the duly appointed Administratrix of the Estate of Vernon Shearer, Deceased, having been so appointed by the Orphan's Court of Philadelphia County, Pennsylvania. She brings this action on her own behalf and on behalf of all those entitled to share in the proceeds of any recovery arising from the death of Vernon Shearer, and is authorized to bring this action on their behalf.

4. A timely claim was filed with the Department of the Army which was denied by letter dated July 8, 1981.

5. On or about January 22, 1979, Vernon Shearer, then 18 years of age, born June 3, 1960, enlisted in the United States Army.

6. At the time of his enlistment, Vernon Shearer, resided at 7811 Woolston Avenue, Philadelphia, Pennsylvania, with his parents, George and Louise Shearer.

7. By virtue of his enlistment, Vernon Shearer, S.S. #175-54-3309, was assigned pay grade E-1 earning a basic pay of $419.40 per month.

8. On or about February 2, 1979, Vernon Shearer was assigned to Basic Unit Training at Ft. Knox, Kentucky.

9. On or about May 5, 1979, Vernon Shearer was assigned to E Troop, 2d Battalion, 3rd Armored Cavalry Division, at Ft. Bliss, Texas.

10. On June 2, 1979, one day before his 19th birthday, Vernon Shearer was away from the military reservation of Ft. Bliss and off duty.

11. At the time of his death the duty status of Vernon Shearer as reflected on Department of Defense form 1300, Report of Casualty, was "Active: authorized absence".

12. On Saturday, June 2, 1979, Private Vernon Shearer was kidnapped at point of gun and was shot to death by Private Andrew Heard (hereafter "Heard"), an active Army service member, in Otero County, New Mexico, approximately 5 miles north of the New Mexico—Texas state line.

13. On August 18, 1975, Andrew Heard, S.S. #496-48-4369, then 28 years of age, born October 7, 1946, had enlisted in the United States Army for a period of 3 years.

14. On January 6, 1976, Private Andrew Heard was transferred by the United States Army from Continental United States to EURA-Germany assigned to the 3rd Armored Division.

15. On August 28, 1976, Private Andrew Heard was arrested for the murder of a German female national committed on August 26, 1976, off the military reservation.

16. The Bill of Indictment presented against Heard by the Regional Court, Chamber of the Criminal Court, HANAU, Germany, stated in part:

> The accused inflicted serious head injuries on the 38-year-old Margarete Hess on the occasion of sexual actions by means of a wrench and a lifting jack and he choked her. Above all he caused serious internal injuries by brutal force especially in the thorax sphere. The injuries caused immediate death.
>
> * * * * * *
>
> The accused showered his victim with blows using a wrench and a lifting jack. He caused her serious head injuries in the sphere of the temples, by which he destroyed the skullcap. Judging from the skin injuries the victim must have received at least two blows. There was also found an injury of the right ear. Furthermore, the accused inflicted serious injuries on the victim in the sphere of the face skull. There were found chip fractures of the upper jaw on the right and on the left side, a fracture right in the middle of the lower jaw and more on the right side. There were skin defects all over the head, the neck, and the throat, which are to be attributed partly to the blows and partly to the choking. The dead body also showed serious injuries in the thorax sphere. Three ribs on the left side were broken. The breastbone had a fracture right across; the organs lying below showed serious injuries. Two veins of the heart were ruptured. The muscles of the right ventricle of the heart were injured. There were longitudinal fissures in the mucous membrane; and there were also two fissures on the combined cranial and arm artery on the right side. These injuries in the thorax sphere were caused by brutal force.

17. Private Heard was originally tried by State District Court (Landgericht) in Hanau on 10 June 1977, convicted of manslaughter (Section 212 of German Criminal Code) and sentenced to nine years adult confinement unsuspended.

18. The Federal Supreme Court (Bundesgerichtshof) ordered a retrial *in toto* on December 2, 1977.

19. Private Heard was found guilty of a less serious form of manslaughter under Section 213 of the German Criminal Code.

20. Private Heard was sentenced to four years confinement, unsuspended.

21. Private Andrew Heard was confined to a U.S. Confinement Facility in Germany between August 27, 1976 and July 17, 1978 and released February 3, 1979, after having served a portion of a 4 year sentence for manslaughter.

22. On February 3, 1979, Private Andrew Heard was transferred from Germany to the Continental United States.

23. On March 5, 1979, Private Andrew Heard was assigned to Headquarters Command, Ft. Bliss, Texas.

24. As early as on or about December 7, 1978, more than 5½ months before Vernon Shearer was murdered, his Battalion Commander in Germany, LTC Rayburn C. Storvall had recommended that Heard be eliminated from the serv-

ice under Chapter 14, Army Regulation 635-200, declaring: "Private Heard is unsuitable for military service as his record discloses."

25. Said recommendation was concurred in by Heard's Division Commander, Col. Donald E. Eckelbarger, on December 7, 1978, who wrote:

> "Recommend approval for Discharge UP Chapter 14, AR 635-200. Reasons for recommending approval: In view of the seriousness of the offenses committed Discharge UP Chapter 14, AR 635-200 would be in the best interest of Private Heard and the United States Army."

26. Said recommendation was concurred in by Brigadier General Charles E. Canedy, United States Army, Acting Commander, 3rd Armored Division, Germany, on December 7, 1978, who wrote:

> "Due to the serious nature of the offense for which he was convicted, elimination action from the service with issuance of an Under Other Than Honorable Discharge Certificate is deemed appropriate."

27. By letter of endorsement dated December 7, 1978, the Commander of Ft. Bliss was directed by the Chief, Appeals Branch, Department of the Army Military Personnel Center, Alexandria, Virginia, to proceed with elimination proceedings against Heard under the provisions of Chapter 14, AR 635-2000, and to return the case with his recommendation for final determination.

28. A mental status evaluation, incident to discharge under AR 635-200, Chapter 14, was not performed on Heard until June 11, 1979, after Heard had murdered Vernon Shearer.

29. Not until June 21, 1979, after Vernon Shearer's murder, did the Staff Judge Advocate of Ft. Bliss recommend approval of request that a board of officers be convened to allow Heard to show cause why he should not be eliminated from the service under Chapter 14, Army Regulation 635-200.

30. Not until July 13, 1979, after Vernon Shearer's murder, did United States Army officials even notify Heard of

its intentions to eliminate him from active duty under the provisions of AR 635-200.

31. On June 11, 1979, due to gunshot wound to the neck, Private Vernon Shearer was pronounced dead in Otero County, New Mexico, by a representative of the office of the Medical Investigator, Alburquerque, New Mexico.

32. Heard was arrested and jailed for the first degree murder of Vernon Shearer on 11 June 1979. He was extradited to Otero County, Alamogordo, New Mexico where he remained in custody pending disposition of charges.

33. On June 11, 1979, a Criminal Complaint, No. 170773 issued against Andrew Heard by the State of New Mexico charging him with the murder of Vernon Shearer.

34. On August 20, 1979, Heard pleaded nolo contendere to the crime of Second Degree Murder with Firearm Enhancement.

35. On August 24, 1979, for the murder of Vernon Shearer, Heard was sentenced by New Mexico District Court Judge Robert M. Doughty, II, to be imprisoned in the Penitentiary of New Mexico for the term of not less than 15 nor more than 55 years with credit for time served from the date of his incarceration on June 11, 1979.

36. An Army Elimination Board was convened on August 14, 1979. A Board of officers recommended that Private Heard be eliminated from military service for reason of misconduct because of civil conviction, for which he received a 4-year sentence of confinement, and furnished an under other than honorable conditions discharge certificate.

37. Private Andrew Heard was separated from the United States Army Under Other Than Honorable Conditions on October 29, 1979, in absentia.

38. Private Andrew Heard was separated from the United States Army under separation authority, paragraph 14-12a, Army Regulation 635-300, for misconduct—conviction by civil court, in absentia, on that date.

39. At the time of his kidnapping and the murder of Vernon Shearer, Heard had previously been known to have killed another individual, and had been convicted of that homicide, and was known by the United States Army to be dangerous and of a murderous disposition. Nevertheless he

was permitted to remain at liberty and free of any restraints, supervision, constraints or control.

40. The United States Government, acting through its Department of the Army, and its duly authorized agents, servants and employees, negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard, or take any action to prevent him from endangering other person, in spite of the defendant's knowledge of his dangerous and murderous propensities, and further failed to warn other persons that he was at large, and of the danger which he presented.

41. The United States Government, acting through its Department of the Army, and its duly authorized agents, servants and employees, negligently and carelessly failed to then remove Andrew Heard from active military duty, in spite of its knowledge of his dangerous and murderous propensities, with a reasonable degree of promptness given the great danger potential that he posed to other active duty service members, including plaintiff's decedent, none of whom were warned of the dangers posed.

42. Solely as a result of the aforesaid, plaintiff brings this action under the Wrongful Death Acts of Pennsylvania and all other applicable jurisdictions, and under the Survivor Act of Pennsylvania, where Vernon Shearer was domiciled, and seeks such other damages as may legally be recovered as a result of or arising from the death of Vernon Shearer.

WHEREFORE, Plaintiff demands judgment against the defendant in an amount in excess of Fifty Thousand ($50,000.00) Dollars plus costs.

/s/ _____

WILLIAM T. CANNON, ESQUIRE
Attorney for Louise Shearer, Ind., and as Administratrix of the ESTATE OF VERNON SHEARER, deceased

DECLARATION

In accordance with 28 U.S.C. 1746, the following unsworn statement is made pertaining to the suit of *Louise Shearer* v. *The United States of America*, Civil Action No. 82-0082.

Vernon Shearer was on active duty in the United States Army at the time of his death and his surviving dependents, if any, are fully entitled to all statutory Veterans Administration Benefits. In addition, Vernon Shearer carried Serviceman's Group Life Insurance for the maximum amount of $20,000, an entitlement due solely to his status as a service member.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 28th day of April 1982, United States of America.

/s/ _____

BRUCE E. KASOLD
Captain, JAGC

Supreme Court of the United States

No. 84-194

UNITED STATES, PETITIONER

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED

ORDER ALLOWING CERTIORARI. Filed *October 29, 1984*.

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Third Circuit* is granted.

Office - Supreme Court, U.S.
FILED
DEC 26 1984
ALEXANDER L. STEVAS,
CLERK

(5)

No. 84-194

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
ROBERT V. ZENER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the survivor of a serviceman who was murdered by another serviceman, while both were off duty and off base, may sue the government for damages under the Federal Tort Claims Act even though the Act bars "[a]ny claim arising out of assault [or] battery."

2. Whether such a suit, alleging that the negligence of the servicemen's superior officers was responsible for the murder, is precluded by the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), which bars suits by servicemen for alleged torts incident to military service.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	3
Summary of argument	7
Argument	9
I. Respondent's claim is barred by the intentional tort exception to the Federal Tort Claims Act	9
II. Respondent's claim is barred by the *Feres* doctrine	24
Conclusion	33

TABLE OF AUTHORITIES

Cases:

Bell v. *New Jersey*, No. 81-2125 (May 31, 1983)	18
Blitz v. *Boog*, 328 F.2d 596, cert. denied, 379 U.S. 855	21
Block v. *Neal*, 460 U.S. 289	21-22
Brooks v. *United States*, 337 U.S. 49	32, 33
Brown v. *United States*, 739 F.2d 362, petition for cert. pending, No. 84-636	27
Bush v. *Lucas*, 462 U.S. 367	20
Chappell v. *Wallace*, No. 82-167 (June 13, 1983)	26, 27, 28, 29
Collins v. *United States*, 259 F. Supp. 363	10
Dalehite v. *United States*, 346 U.S. 15	12, 13
Fair v. *United States*, 234 F.2d 288	22, 23
Feres v. *United States*, 340 U.S. 135	*passim*
Gaudet v. *United States*, 517 F.2d 1034	21
Gibson v. *United States*, 457 F.2d 1391	22
Gilligan v. *Morgan*, 413 U.S. 1	27
Hatzlachh Supply Co. v. *United States*, 444 U.S. 460	5

Cases—Continued: Page

Henning v. *United States*, 446 F.2d 774, cert. denied, 404 U.S. 1016 31
Hicks v. *United States*, 511 F.2d 407 22
Hughes v. *Sullivan*, 514 F. Supp. 667 ..... 21, 23
Hughes v. *United States*, 662 F.2d 219, aff'g *Hughes* v. *Sullivan*, 514 F. Supp. 667 21
Jefferson v. *United States*, 178 F.2d 518, aff'd *sub nom. Feres* v. *United States*, 340 U.S. 135 28
Johnson v. *United States*, 631 F.2d 34, cert. denied, 451 U.S. 1018 31
Joseph v. *United States*, 505 F.2d 525 31
Kosak v. *United States*, No. 82-618 (Mar. 21, 1984) 9, 10, 13
Laird v. *Nelms*, 406 U.S. 797 12
Laird v. *Tatum*, 408 U.S. 1 32
Laswell v. *Brown*, 683 F.2d 261, cert. denied, 459 U.S. 1210 31
Lombard v. *United States*, 690 F.2d 215, cert. denied, 462 U.S. 1118 31
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Curran*, 456 U.S. 353 18
Monaco v. *United States*, 661 F.2d 129, cert. denied, 456 U.S. 989 31
Monell v. *Department of Social Services*, 436 U.S. 658 ..... 14, 20
Naisbitt v. *United States*, 611 F.2d 1350, cert. denied, 449 U.S. 885 21
Owen v. *City of Independence*, 445 U.S. 622 20
Panella v. *United States*, 216 F.2d 622 ..... 14, 15, 22, 24
Parker v. *Levy*, 417 U.S. 733 29
Rayonier, Inc. v. *United States*, 352 U.S. 315 9
Rogers v. *United States*, 397 F.2d 12 ..... 22, 23
Southard v. *United States*, 397 F. Supp. 409, aff'd, 535 F.2d 247 31
Stencel Aero Engineering Corp. v. *United States*, 431 U.S. 666 ..... 5, 26, 28, 29
Underwood v. *United States*, 356 F.2d 92 ..... 22, 23
United States v. *Brown*, 348 U.S. 110 ..... 25, 29, 30
United States v. *Muniz*, 305 F.2d 285, aff'd, 374 U.S. 150 ..... 22, 25, 29

Cases—Continued: Page

United States v. *Shively*, 345 F.2d 294, cert. denied, 382 U.S. 883 ..... 21, 23
United States v. *Spelar*, 338 U.S. 217 ..... 9, 12
Wine v. *United States*, 705 F.2d 366 21
Yolken v. *United States*, 590 F.2d 1303 31

Statutes:

Federal Tort Claims Act:
28 U.S.C. 1346(b) 2, 3, 11, 29
28 U.S.C. 2671 *et seq.* 3
28 U.S.C. 2674 29
28 U.S.C. 2680 ..... 2, 10
28 U.S.C. 2680(c) 10
28 U.S.C. 2680(h) ..... *passim*
Pub. L. No. 93-253, § 2, 88 Stat. 50 ..... 9, 17
5 U.S.C. 4301 *et seq.* 20
5 U.S.C. 8116(c) 19
10 U.S.C. 1475 30
10 U.S.C. 1477 30
10 U.S.C. 1478 30
38 U.S.C. 415 30
38 U.S.C. 765 30
42 U.S.C. 1983 14

Miscellaneous:

Boger, Gitenstein, & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C.L. Rev. 497 (1976) 18
Borchard, *The Federal Tort Claims Bill*, 1 U. Chi. L. Rev. 1 (1933) 16
General Tort Bill: Hearings Before a Subcomm. of the House Comm. on Claims, 72d Cong., 1st Sess. (1932) 13
2 F. Harper and F. James, *The Law of Torts* (1956) 15, 16
H.R. Rep. 97-384, (Pt. 1), 97th Cong., 1st Sess. (1981) 26
Note, *The Federal Tort Claims Act*, 56 Yale L.J. 534 (1947) 13

Miscellaneous—Continued: Page

W. Prosser, *Handbook of the Law of Torts* (4th ed. 1971) 15, 16
Reorganization Plan No. 2 of 1973: Hearings Before the Subcomm. on Reorganization, Research, and International Organizations of the Senate Comm. on Government Operations, 93d Cong., 1st Sess., Pt. 7 (1973) 18
Restatement (Second) of Agency (1958) 15, 16
Restatement (Second) of Torts (1965) 11, 24
S. Rep. 93-588, 93d Cong., 1st Sess. (1973) 17, 18
P. Schuck, *Suing Government* (1983) 20
The Feres Doctrine As It Relates to Private Claims: Hearings Before the Subcomm. on Agency Administration of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (1982) 26
Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary, 76th Cong., 3d Sess. (1940) 13
Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary, 77th Cong., 2d Sess. (1942) 15

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-194

UNITED STATES OF AMERICA, PETITIONER

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 723 F.2d 1102. The statements on denial of rehearing (Pet. App. 34a-36a) are reported at 729 F.2d 266. The opinion of the district court (Pet. App. 24a-30a) is reported at 576 F. Supp. 672.

JURISDICTION

The judgment of the court of appeals (Pet. App. 31a-32a) was entered on December 19, 1983. A peti-

tion for rehearing was denied on March 7, 1984 (Pet. App. 33a-36a). On June 4, 1984, Justice Brennan extended the time in which to file a petition for a writ of certiorari to August 4, 1984. The petition was filed on August 2, 1984, and was granted on October 29, 1984. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

28 U.S.C. 1346(b) provides in part:

> Subject to the provisions of [28 U.S.C. 2671-2680], the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2680 provides in part:

> The provisions of [28 U.S.C. 2671-2680] and section 1346(b) of this title shall not apply to—
>
> * * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this

> title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

STATEMENT

1. Respondent is the mother and administratrix of a serviceman, Private Vernon Shearer, who was stationed at Fort Bliss, Texas. While Shearer was off duty and off the base, he was kidnapped and murdered by another serviceman, Private Andrew Heard, who was also stationed at Fort Bliss and was also off duty at the time. This crime occurred in Otero County, New Mexico, which is adjacent to Fort Bliss. Pet. App. 2a-3a; J.A 5, 7. Heard was convicted of Shearer's murder in a New Mexico state court and sentenced to a term of 15 to 55 years' imprisonment (Pet. App. 22a; J.A 13).

Respondent subsequently brought this action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2671 *et seq.*, seeking damages from the United States. She claimed that the Army's negligent failure to prevent Heard from murdering Shearer was responsible for Shearer's death. Specifically, respondent alleged (J.A. 14):

> 40. The United States Government, acting through its Department of the Army, * * * negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard, or take any action to prevent him from endanger-

> ing other people, in spite of the [government's] knowledge of his dangerous and murderous propensities, and further failed to warn other persons that he was at large, and of the danger which he presented.
>
> 41. The United States Government, acting through its Department of the Army, * * * negligently and carelessly failed to then remove Andrew Heard from active military duty, in spite of its knowledge of his dangerous and murderous propensities, with a reasonable degree of promptness given the great danger potential that he posed to other active duty service members, including [Shearer], none of whom were warned of the dangers posed.

Respondent asserted that in 1977, while Heard was assigned to an Army base in Germany, he was convicted by a German court of manslaughter and sentenced to a four-year prison term. In February 1979, when German authorities granted Heard an early release from that term, the Army promptly removed him from Germany and transferred him to Fort Bliss. By the time Heard killed Shearer, in June 1979, the Army had initiated proceedings to discharge Heard. J.A. 10-11.

2. The United States District Court for the Eastern District of Pennsylvania granted summary judgment in favor of the government (Pet. App 24a-32a). The district court did not address the government's contention that respondent's claim is barred by 28 U.S.C. 2680(h), the intentional tort exception to the FTCA, which provides in part that the government is not liable for "[a]ny claims arising out of assault [or] battery." See Pet. App. 29a n.4. Instead, the court ruled that respondent's claim is precluded by *Feres* v. *United States*, 340 U.S. 135 (1950),

which held that a serviceman may not sue the government under the FTCA for alleged torts incident to military service.

The district court stated that under *Feres*, the "question is not whether decedent was engaged in activity incident to military service when he incurred his injuries. Rather, the 'focus . . . is upon when and how the negligent act occurs' " (Pet. App. 26a (citation and emphasis omitted)). The court reasoned that because respondent "allege[d] that the Army was negligent in failing to exert reasonable control over" Heard, respondent's claims "relate directly to decisions of military personnel made in the course of the performance of their military duty and, therefore, are barred by *Feres*" (*ibid.*). The district court also noted that respondent is entitled to receive veterans' benefits (*id.* at 29a) and explained that "the existence of a no fault compensation scheme" for servicemen, veterans, and their survivors is another reason to apply the *Feres* doctrine (Pet. App. 28a-29a, citing *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977), and *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 464-465 (1980)).

3. A divided panel of the court of appeals reversed (Pet. App. 1a-23a). The court of appeals overturned the district court's ruling that *Feres* bars respondent's claim, explaining that "[g]enerally, an off-duty serviceman not on the military base and not engaged in military activity at the time of injury, can recover under FTCA" (Pet. App. 5a-6a) and that "being kidnapped off base at gun point can never be perceived as one of the activities or anticipated * * * benefits of being in the armed services" (*id.* at 7a; emphasis omitted).

The court of appeals also held that the intentional tort exception to the FTCA does not bar respondent's claim. The court noted that respondent's complaint alleged that the government was negligent and reasoned that "if an assault and battery occurred as a 'natural result' of the government's failure to exercise due care, the assault and battery may be deemed to have its roots in negligence and therefore it is within the scope of the FTCA" (Pet. App. 8a). Specifically, the court stated that the intentional tort exception would not preclude the claim of a plaintiff who "allege[d] sufficient facts which, if proven, would demonstrate that the government should have reasonably anticipated that one of their employees would commit an intentional tort" (*ibid.*). The court ruled that respondent's claim satisfied this standard because respondent alleged that the Army knew of Heard's "violent propensities" and that "[n]evertheless, Heard remained in the Army and was treated as a member in good standing * * * [and] enlisted men, including Shearer, were not warned about his violent past or present disposition" (*id.* at 9a).

Judge Garth dissented (Pet. App. 10a-23a). He noted his disagreement with the majority on the *Feres* issue (*id.* at 11a & n.1) but principally discussed the intentional tort exception. Judge Garth stated that respondent's claim, "although appearing on the surface to charge negligence is, in truth, no more than a complaint seeking monetary recovery for an assault and battery" (*id.* at 11a). He noted that Section 2680(h) applies to claims "arising out of" assault or battery and not just claims "for" assault or battery (see Pet. App. 13a-14a) and accordingly, by its terms, precludes respondent's claim.

The court of appeals denied rehearing en banc by a vote of 6-4 (Pet. App. 33a-36a).

SUMMARY OF ARGUMENT

I. The plain language of the Federal Tort Claims Act precludes respondent's claim. The FTCA bars "[a]ny claim arising out of assault [or] battery" (28 U.S.C. 2680(h)). Respondent's claim arises out of Heard's battery within the ordinary meaning of that phrase: Heard's battery gave rise to the injury to respondent, and respondent would have no claim if Heard had not committed a battery. Respondent cannot circumvent the intentional tort exception by framing a complaint that sounds in negligence, because the FTCA does not simply bar claims *for* assault and battery; it precludes any claim "arising out of" an assault or battery.

If the court of appeals' approach were to prevail, persons who claim to have been injured by the intentional torts of government employees could avoid Section 2680(h) simply by alleging that the government should have known of the employee's proclivities and should have done more to supervise or control him. Allowing such suits would thwart the purpose of the intentional tort exception, which is to preclude litigation over government employee's intentional torts. Moreover, under the court of appeals' approach, Section 2680(h) would bar claims by parties injured by government employees' intentional torts only when the sole basis of the claim is that the government is vicariously liable on a theory of respondeat superior; the language and legislative history of the FTCA, as well as the common law background against which it was enacted, all make it clear that Congress did not intend to distinguish between claims based on a respondeat superior theory and claims that, like respondent's, are based on a theory of "negligent supervision." Finally, in 1974 Congress amended Sec-

tion 2680(h) to permit FTCA actions to be brought for certain intentional torts committed by law enforcement officers; the legislative history of this amendment—indeed, the fact that Congress considered the amendment necessary—reinforces the conclusion that the FTCA does not permit suits like respondent's.

Furthermore, the court of appeals' ruling imposes liability on the government for the tort of an off-duty employee, a result Congress could not have intended. And by entertaining a claim that the government was negligent in its supervision of an employee, the decision below requires judicial examination of the government's personnel decisions and practices. Congress has enacted other statutes addressed to the government's practices in supervising its employees; it has never been thought that private parties can use the FTCA as a means of obtaining judicial review of the adequacy of those practices.

II. Respondent's claim is also barred by the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), which held that the FTCA does not authorize servicemen to sue the government for injuries incident to military service. Respondent's claim, brought on behalf of a serviceman, would require courts to second-guess sensitive military decisions relating to the discipline, control, and discharge of Heard, a fellow serviceman. Respondent's claim also threatens to subvert the command hierarchy by challenging, on behalf of a serviceman, the way in which the serviceman's superior officers discharged an important duty to him.

The court of appeals explained why *Feres* does not bar respondent's claim by emphasizing the fact that Shearer was off duty and off the base when Heard

injured him. But this explanation is belied by the very aspect of respondent's claim that the court of appeals most heavily stressed in justifying its erroneous interpretation of Section 2680(h)—the fact that respondent's claim challenges not Heard's actions but the disciplinary and command decisions of Heard's and Shearer's superiors. These are precisely the kinds of military decisions that the *Feres* doctrine is designed to insulate from judicial scrutiny.

ARGUMENT

I. RESPONDENT'S CLAIM IS BARRED BY THE INTENTIONAL TORT EXCEPTION TO THE FEDERAL TORT CLAIMS ACT

A. The "express words" of the Federal Tort Claims Act are a "[s]ufficient basis" for concluding that respondent's claim is barred (*United States* v. *Spelar*, 338 U.S. 217, 219 (1949)). See *Kosak* v. *United States*, No. 82-618 (Mar. 21, 1984), slip op. 5-6; *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 318 (1957). The FTCA, by its terms, "does not apply" to "[a]ny claim arising out of assault [or] battery" 28 U.S.C. 2680(h)).[1] Respondent's claim "arises out of" the battery committed by Heard within the ordinary meaning of that phrase: Heard's tort gave rise to the injury to respondent, and respondent would have no claim if that tort had not been committed.

The court of appeals attempted to avoid the plain language of Section 2680(h) by reasoning that re-

---

[1] In 1974, Congress amended Section 2680(h) to permit FTCA suits against the government for certain intentional torts of law enforcement officers. Pub. L. No. 93-253, § 2, 88 Stat. 50. There is no suggestion in this case that any of the government employees whose acts are at issue were law enforcement officers. See also pages 16-18, *infra*.

spondent's claim sounded in negligence, not battery. But this approach treats Section 2680(h) as if it barred claims *for* assault or battery. As Judge Garth noted in his dissent, that is not what the statute says. " 'Congress could easily have excepted claims *for* assault. It did not; it used the broader language excepting claims *arising out of* assault.' " Pet. App. 14a, quoting *Collins* v. *United States*, 259 F. Supp. 363, 364 (E.D. Pa. 1966). Unless Congress's choice of words is to be accorded no significance, the exception must be read to cover claims that sound in torts other than battery but nevertheless "arise out of" a battery. Respondent's suit presents such a claim.

This Court's decision last Term in *Kosak* v. *United States*, *supra*, reinforces this conclusion. In *Kosak* the Court construed the parallel exception, also contained in Section 2680, for "[a]ny claim arising in respect of * * * the detention of any goods or merchandise by any officer of customs" (28 U.S.C. 2680(c)). The Court equated the phrase "any claim arising in respect of" with the phrase "any claim 'arising out of' " (*Kosak*, slip op. 6) and held that such "encompassing" terminology has the broadest meaning: it "sweep[s] within the exception all injuries associated in any way with the 'detention' of goods." *Ibid.* It necessarily follows that the phrase "[a]ny claim arising out of assault [or] battery" must "sweep within the exception all injuries associated in any way with" a battery such as that committed by Heard.

B. The court of appeals did not identify the category of claims that, in its view, *are* precluded by the intentional tort exception. But the court's reasoning that respondent's claim is not barred because it sounds in negligence implies that the court would permit a plaintiff to seek damages under the FTCA

for any intentional tort committed by a government employee so long as the plaintiff alleged that the government was negligent in its selection, retention, or supervision of the employee. See Pet. App. 8a.

It is true that, in this case, Heard was indisputably acting outside the scope of his employment when he committed the intentional tort. The logic of the court of appeals' opinion, however, is not limited to employees acting outside the scope of their employment; claimants are equally able to allege that the government was negligent in its selection or supervision of employees acting within the scope of their employment, and the reasoning of the court of appeals' opinion would extend to such claims as well. Indeed, it would be paradoxical to try to limit the effects of the court of appeals' approach by confining it to cases in which an employee has acted outside the scope of his authority, because Congress could not have intended to impose on the government greater responsibility for the supervision of off-duty employees than for the supervision of employees acting within the scope of their authority. Congress expressly limited the government's liability under the FTCA to claims for injuries caused by employees "acting within the scope of [their] office or employment" (28 U.S.C. 1346(b)), and at common law, an employer has no general duty to exercise reasonable care to prevent an employee from injuring others while acting outside the scope of his employment and off the employer's premises. See Restatement (Second) of Torts § 315 (1965). This is true even if the employer knows of the employee's dangerous proclivities (see Restatement (Second) of Torts § 314) and even if the employer is fully able to control the employee's off-duty activities. See Restatement (Second) of Torts § 317 (specifying

limited circumstances in which the employer has a duty to control off-duty employees).

Thus, an allegation of "negligent supervision" would, under the court of appeals' approach, automatically enable any person injured by a government employee's intentional tort to hold the government responsible. If the court of appeals' approach were to prevail, therefore, it would create a substantial loophole in the intentional tort exception. Moreover, Section 2680(h) would become quite limited in its effect: it would preclude a claim by a party allegedly injured by a government employee's intentional tort only when the *sole* basis on which the claimant seeks damages is that the government is vicariously liable on a theory of respondeat superior.

1. As a practical matter, the court of appeals' interpretation of Section 2680(h) would, in all likelihood, thwart the purposes of the intentional tort exception by precipitating far more litigation over government employees' intentional torts than Congress envisioned when it enacted the FTCA. In this way, the court of appeals' decision would "judicially admit at the back door that which has been legislatively turned away at the front door" (*Laird* v. *Nelms*, 406 U.S. 797, 802 (1972)).

At the time the FTCA was enacted, the notion that the government would be exposed to liability for the torts of its employees was novel and controversial, and Congress considered the proposed waiver of sovereign immunity for an exceptionally long time. See *Dalehite* v. *United States*, 346 U.S. 15, 24 (1953); *Spelar*, 338 U.S. at 219. When Congress did enact the FTCA, its principal objective was to make the government liable for the ordinary negligence of its employees: "Uppermost in the collective mind of Congress were the ordinary common-law torts. Of these, the exam-

ple which is reiterated in the course of the repeated proposals for submitting the United States to tort liability is 'negligence in the operation of vehicles.'" *Dalehite*, 346 U.S. at 28 (footnotes omitted). See also *Kosak*, slip op. 7. Beyond the core area of negligent automobile accidents, Congress's intention was to proceed cautiously so as not to expose the government to litigation that would be difficult to defend and might lead to an excessive drain on the treasury. See Note, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 547 (1947).[2] An authoritative source on the meaning of the FTCA (see *Kosak*, slip op. 8-9) explained to Congress that the "theory" of the intentional tort exception "is that, since this bill is a radical innovation, perhaps we had better take it step by step." *Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 22 (1940) (statement of Alexander Holtzoff).

Under the court of appeals' approach, however, a claim seeking damages for an intentional tort can be brought under the FTCA if the plaintiff "allege[s] * * * that the government should have reasonably anticipated that one of their employees would commit an intentional tort" (Pet. App. 8a). A party who claims

---

[2] Indeed, when an Assistant Attorney General who was involved in the drafting of one of the bills that ultimately became the FTCA was called upon by members of a congressional committee to defend the breadth of the exceptions—including the intentional tort exception—he explained: "I suppose that the bulk of the cases we are trying to take care of are personal-injury cases caused by automobiles of the post-office service. There are no exceptions covering those." *General Tort Bill: Hearings Before a Subcomm. of the House Comm. on Claims*, 72d Cong., 1st Sess. 17 (1932) (testimony of Assistant Attorney General Rugg).

to have been injured by a government employee's intentional tort will often be able to make such an allegation by pointing to some aspect of an employee's record and asserting that it reveals a proclivity to engage in wrongful conduct. Congress's cautious approach strongly suggests that it did not intend to open the door to litigation over government employees' intentional torts in all of the numerous instances in which such an allegation might be made.

2. Neither the text nor the legislative history of the FTCA suggests that Congress intended to distinguish between claims for injuries from intentional torts that are based on a negligent supervision theory and claims based on a theory of respondeat superior, or that Congress intended to permit the former and preclude only the latter. Congress knew how to draft a statute authorizing damages actions against the government that would draw such a distinction and preclude only respondeat superior liability. See, *e.g.*, *Monell* v. *Department of Social Services*, 436 U.S. 658, 691-692 (1978) (plain language of 42 U.S.C. 1983 precludes respondeat superior liability of municipalities but permits liability for wrongful acts taken pursuant to municipal policy). But Congress expressed no such intention in the language of Section 2680(h). Instead, as we have noted, the plain language of Section 2680(h) bars "negligent supervision" and respondeat superior claims alike.

While the legislative history of the intentional tort exception is "meagre" (*Panella* v. *United States*, 216 F.2d 622, 625 (2d Cir. 1954) (Harlan, J.)), it, too, suggests that Congress did not distinguish between "negligent supervision" claims and respondeat superior claims. Cf. *Monell*, 436 U.S. at 693-695 & n.57. For example, Congress was advised by the Department of Justice that the intentional tort exception would apply where "some agent of the Government gets in a fight with some fellow * * * and socks him[.]" *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 33 (1942). See *Panella*, 216 U.S. at 626. But a government employee's fight would not necessarily, or even ordinarily, be a basis for imposing respondeat superior liability on the government. See Restatement (Second) of Agency, App., § 245, at 397 (1958) (Reporter's Note) (describing cases in which an employee's battery, growing out of altercation while on the job, was held not to be a basis for imposing liability on employer). Indeed, the law defining the circumstances in which an employee's "get[ting] in a fight" would be considered acting within the scope of his employment varies significantly from state to state. See Restatement (Second) of Agency § 245, comment b; 2 F. Harper & F. James, *The Law of Torts* 1392 & nn.16-20 (1956) (citing cases); W. Prosser, *Handbook of the Law of Torts* 465-466 (4th ed. 1971). To the extent an employee's fight does not constitute an act within the scope of employment, the only basis for a suit against the government would be a negligent supervision theory like respondent's. The legislative history suggests, however, that Congress believed claims growing out of employees' fights were barred by the intentional tort exception no matter what the theory of liability.

More generally, the common law background against which Congress enacted the FTCA makes it implausible to suppose that Congress would have enacted a broad exception for claims "arising out of" intentional torts solely in order to preclude respondeat

superior liability. In the nineteenth century, many courts held that *no* intentional tort committed by an employee would subject the employer to vicarious liability; those courts reasoned that intentional torts by definition are outside the scope of employment. See Restatement (Second) of Agency, App., § 245, at 390 (Reporter's Note) ("It was thought for some time that the rule [of respondeat superior liability] could not include situations in which a servant did an intentionally wrongful act toward the plaintiff"); 2 Harper & James, *supra*, at 1389 & nn.1, 2 (citing cases); Prosser, *supra*, at 464 & n.47. At the time Congress considered and enacted the FTCA, many jurisdictions continued to define more narrowly than today the category of intentional torts that would be viewed as being within the scope of employment. See Restatement (Second) of Agency, App., § 245, at 390-391; Prosser, *supra*, at 466 & nn.67-68. But neither the language nor the legislative history of Section 2680(h) gives any indication that it was directed only at the problem of respondeat superior liability for intentional torts—a problem that many members of Congress, at the time, may well have perceived as a relatively narrow and limited concern. On the contrary, the intentional tort exception was viewed as "represent[ing] a considerable limitation of substantive liability" (Borchard, *The Federal Tort Claims Bill*, 1 U. Chi. L. Rev. 1, 4 (1933)). There is no indication that Congress intended simply to adjust, in a relatively technical way, the showing a plaintiff must make in order to recover for injuries caused by a government employee's intentional tort; Congress intended to preclude litigation over such torts entirely.

3. The intentional tort exception was amended in 1974 to permit FTCA suits for certain intentional

torts by law enforcement officers. Pub. L. No. 93-253, § 2, 88 Stat. 50. The amendment provides:

> *Provided*, That with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of [the FTCA] shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

This amendment is not directly relevant to respondent's claim, because there is no suggestion that any of the government employees whose acts are at issue in this case is a law enforcement officer. But the legislative history of the amendment, and the fact that Congress considered it necessary to enact the amendment, reinforce the conclusion that Congress did not intend the intentional tort exception to be circumvented by an allegation of negligent supervision.

The legislative history of the 1974 amendment explains that it was adopted in response to reports of "several incidents" of "abusive, illegal and unconstitutional 'no-knock' raids" by federal narcotics agents. S. Rep. 93-588, 93d Cong., 1st Sess. 2 (1973). If the court of appeals' interpretation of the intentional tort exception were correct, no amendment would have been necessary to the extent that these raids were the result of negligent supervision by the agents' superiors. But although Congress had reason to believe that the incidents were the result of in-

adequate supervision—for example, it was alleged that agents from the same office were repeatedly involved in such incidents (see *id.* at 2)[3]—Congress never suggested that the victims of the raids might have been able to bring an FTCA action under the unamended statute.

On the contrary, the explicit premise of the 1974 amendment was that the unamended Section 2680(h) "protect[ed] the Federal Government from liability where its agents commit intentional torts such as assault and battery" (S. Rep. 93-588, *supra*, at 3). There is no indication that Congress believed the government's liability depended on whether the agents had been properly supervised: Congress's understanding of its own prior enactment was that Section 2680(h) precluded *all* claims for damages resulting from government employees' intentional torts, whatever the theory of liability. This congressional understanding is entitled to great weight. See, *e.g.*, *Bell* v. *New Jersey*, No. 81-2125 (May 31, 1983), slip op. 11 & n.12; *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 378 & n.61 (1982) ("[W]e must examine Congress' perception of the law that it was shaping or reshaping.").

---

[3] See also Boger, Gitenstein, & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C.L. Rev. 497, 502-503 (1976). Senator Percy, a leading proponent of the 1974 amendment, said he "hope[d]" that the incidents were "isolated" but that "there is evidence to show that there is a gestapo mentality that exists." *Reorganization Plan No. 2 of 1973: Hearings Before the Subcomm. on Reorganization, Research, and International Organizations of the Senate Comm. on Government Operations*, 93d Cong., 1st Sess., Pt. 7, at 1034 (1973). Senator Percy also stated, in a letter to the Department of Justice, that the illegal raids may have revealed the inadequacy of its procedures. *Id.*, Pt. 3, at 548-549. See also *id.* at 474 (remarks of Sen. Nunn).

C. Section 2680(h) should be given its plain meaning, and interpreted to preclude suits based on a "negligent supervision" theory, for the additional reason that the court of appeals' contrary approach would permit the FTCA to be used in ways that Congress could not have intended. Ordinarily, a court considering a claim under the FTCA will examine the events that occurred between the plaintiff and the government employee who allegedly inflicted an injury on the plaintiff. Respondent, however, in an effort to avoid Section 2680(h). has shifted the focus from the events that occurred between Heard and Shearer—since a claim that focused on those events would obviously be barred by the intentional tort exception—and has emphasized instead the relationship between Heard and his superior officers. This is strictly an intra-governmental relationship to which Shearer, the victim of the government's alleged tort, is a stranger. We know of nothing in the language or legislative history of the FTCA suggesting that an FTCA suit may have as its focus intra-governmental dealings between two federal employees. Cf. 5 U.S.C. 8116(c).

The court of appeals' decision to permit a "negligent supervision" claim is particularly inappropriate because, in order to decide such a claim, a court would necessarily have to review the adequacy of government personnel practices; the essence of a "negligent supervision" claim is precisely the allegation that certain personnel decisions made by the government in the course of supervising an employee were tortious. As we will discuss shortly, in the military context presented by this case that is a sufficient basis for concluding that respondent's claim is barred by the *Feres* doctrine. See pages 24-32, *infra*. But even

in a civilian context, a tort action for damages under the FTCA is not the proper vehicle for a judicial inquiry into whether the government is managing its employees in the correct fashion. Congress has devoted considerable attention to the regulation of federal personnel practices. See, *e.g.*, 5 U.S.C. 4301 *et seq.*; cf. *Bush* v. *Lucas*, 462 U.S. 367, 380-388 (1983). A court should, therefore, hesitate to evaluate the correctness of a personnel decision unless Congress has explicitly invited it to do so. See *Bush*, 462 U.S. at 388. It has never been thought that Congress, in enacting the FTCA, intended to authorize claimants to obtain judicial review of federal personnel practices.

Of course, by imposing vicarious liability on the government for the torts of its employees, the FTCA creates financial incentives for the government to improve its personnel practices so that its employees commit fewer and less severe torts. See, *e.g.*, *Monell*, 436 U.S. at 693 (one principal justification for holding an employer liable for the torts of its employee "is the common-sense notion that no matter how blameless an employer appears to be in an individual case, accidents might nonetheless be reduced if employers had had to bear the cost of accidents."); cf. P. Schuck, *Suing Government* 102-109 (1983); *Owen* v. *City of Independence*, 445 U.S. 622, 651-652 (1980). But since Congress chose to influence government supervisory practices indirectly, by holding the government liable in damages when its employees tortiously injure members of the public, there is no reason to believe that Congress also intended to allow members of the public to call upon courts to scrutinize those practices directly. Moreover, Section 2680(h) reflects Congress's decision *not* to hold the government responsible in damages when an employee

commits an intentional tort. This suggests that Congress did not view the FTCA as a means of inducing the government to improve its supervisory practices so as to reduce the likelihood that employees will commit intentional torts. The court of appeals therefore erred in allowing the FTCA to be used for that purpose.

D. As Judges Garth and Adams pointed out in their dissenting opinions below, every other court of appeals that has considered the issue has held that the FTCA does not permit the intentional tort exception to be circumvented by an allegation that the government was negligent in its supervision of the employee who committed the intentional tort. See, *e.g.*, *Wine* v. *United States*, 705 F.2d 366 (10th Cir. 1983) (battery committed by off-duty serviceman); *Naisbitt* v. *United States*, 611 F.2d 1350 (10th Cir.), cert. denied, 449 U.S. 885 (1980) (same); *United States* v. *Shively*, 345 F.2d 294, 297 (5th Cir.), cert. denied, 382 U.S. 883 (1965) (battery committed by off-duty serviceman with pistol negligently issued by the Army); *Hughes* v. *United States*, 662 F.2d 219 (4th Cir. 1981), aff'g *Hughes* v. *Sullivan*, 514 F. Supp. 667 (E.D. Va. 1980) (assault and battery committed by civilian employee while on duty). See also *Gaudet* v. *United States*, 517 F.2d 1034 (5th Cir. 1975); *Blitz* v. *Boog*, 328 F.2d 596, 598-599 (2d Cir.), cert. denied, 379 U.S. 855 (1964) (Marshall, J.) (in determining whether a claim is barred by the intentional tort exception, "[i]t is * * * the substance of the claim, and not the language used in stating it, that controls.").[4]

---

[4] We note that *Block* v. *Neal*, 460 U.S. 289 (1983), does not support the court of appeals' interpretation of Section 2680(h). Neal's FTCA claim was not barred by the exception

Respondent (Br. in Opp. 7-9, 11, 12) and the court of appeals (Pet. App. 8a-9a) rely on decisions in a line of cases stemming from *Panella* v. *United States*, *supra*, in which a party injured by the intentional tort of a non-employee who was under the government's supervision—such as a prisoner or a patient in a government mental hospital—was allowed to bring an FTCA action on the claim that the government was negligent in its supervision of the tortfeasor. See, *e.g.*, *United States* v. *Muniz*, 305 F.2d 285, 287 (2d Cir. 1962), aff'd, 374 U.S. 150 (1963); *Hicks* v. *United States*, 511 F.2d 407 (D.C. Cir. 1975); *Gibson* v. *United States*, 457 F.2d 1391 (3d Cir. 1972); *Rogers* v. *United States*, 397 F.2d 12 (4th Cir. 1968); *Underwood* v. *United States*, 356 F.2d 92 (5th Cir. 1956); *Fair* v. *United States*, 234 F.2d 288 (5th Cir. 1956). But the rationale of these decisions is fully consistent with the result we urge here because—as Justice (then Judge) Harlan explained in *Panella* (see 216 F.2d at 624-626)—these cases involve intentional torts committed by persons other than government employees.[5]

---

in Section 2680(h) for "[a]ny claim arising out of * * * misrepresentation" because Neal alleged injuries other than those resulting from the misrepresentations made by a government agency. As the Court explained, Neal's complaint would have alleged injury even if no misrepresentations had been made to her. See 460 U.S. at 297-298. Shearer's injury, by contrast, resulted from the intentional tort of a government employee; if Heard had not committed an intentional tort, Shearer would not have been injured.

[5] In some of the cases, the intentional tortfeasor was, for example, a dangerous mental patient who also happened to be a government employee; but the source of the government's duty to supervise him was his status as a patient, not his status as an employee.

As Judge Harlan recognized, a literal reading of Section 2680(h) might be thought to preclude a claim like that upheld in *Panella* and the cases that follow it. 216 F.2d at 624. But it is unnecessary to adopt such a reading in order to conclude that respondent's claim is barred.[6] When Congress drafted the FTCA, it was defining the extent to which the government would be liable for *employees'* torts. Consequently, when Congress mentioned specific torts in Section 2680(h), such as assault and battery, Congress must have had in mind, at least, assaults and batteries committed by government employees; Congress must have intended the exception to cover at least that category of intentional torts. Since Congress was not focusing its attention on torts committed by persons other than government employees, it is not necessary to conclude that Congress had such persons in mind when it enacted Section 2680(h).

Moreover, for policy reasons Congress would not necessarily have equated the intentional torts of government employees with the intentional torts of other persons the government supervises. The supervision of employees is a radically different governmental activity, in both its scale and the range of policy considerations it implicates, from the supervision of, for example, prisoners and patients. The supervision of the government's approximately four million military and civilian employees takes place

---

[6] In fact, several of the cases on which respondent relies were decided by circuits in which respondent's claim would have been barred. Compare *Rogers* v. *United States*, *supra*, with *Hughes* v. *United States*, *supra*; compare *Underwood* v. *United States*, *supra*, and *Fair* v. *United States*, *supra*, with *United States* v. *Shively*, *supra*.

constantly and in virtually every place where the government is located; to a large extent the operation of the government consists of the supervision of employees. By contrast, the supervision of, for example, prisoners or mental patients is the product of a discrete governmental decision to engage in a certain specific activity, such as the operation of a prison or hospital; such decisions are made with the knowledge that the activity may pose special hazards to third parties. See Restatement (Second) of Torts § 319 (1965). Consequently, there is no inconsistency in concluding, as the *Panella* line of cases concludes, that Congress did not intend to subject the government to liability for the alleged negligent supervision of employees who commit intentional torts but did intend to hold it responsible for exercising due care when it undertakes supervision of dangerous non-employees.

II. RESPONDENT'S CLAIM IS BARRED BY THE *FERES* DOCTRINE

In explaining why the intentional tort exception does not preclude respondent's claim, the court of appeals repeatedly emphasized that the basis of respondent's claim was not Heard's intentional tort but rather the actions of Heard's and Shearer's military superiors, who allegedly were negligent in their supervision of Heard. But when the court of appeals considered the government's contention that respondent's suit is barred by the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950)—which held that the FTCA does not authorize suits by servicemen for alleged torts that are incident to military service—it radically altered its view of respondent's claim. A suit on behalf of a serviceman that challenges the supervisory decisions of superior officers implicates concerns at the very core of the *Feres* doctrine and should plainly be barred. In order to avoid that obvious conclusion, the court of appeals analyzed respondent's claim as if it were based on Heard's intentional tort. For example, it placed primary reliance on the fact that Shearer was off duty and off the base when he was killed (Pet. App. 5a-6a), and it remarked that "being kidnapped" is not an activity incident to military service (*id.* at 7a).

Respondent and the court of appeals cannot have it both ways. As we have explained, respondent should not be allowed to circumvent the intentional tort exception by framing a complaint that seeks damages for assault and battery but purports only to challenge the personnel decisions of Heard's and Shearer's superior officers. But if respondent does attempt to circumvent Section 2680(h) in this way, her claim is squarely barred by *Feres*.

1. The Court has explained that the *Feres* doctrine is principally based on the following considerations:

> the "peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty. . . ."

United States v. *Muniz*, 374 at 162, quoting *United States* v. *Brown*, 348 U.S. 110, 112 (1954). The Court has also explained that the purpose of the *Feres* doctrine is to avoid a trial at which courts must engage in "second-guessing military orders"; at which the "issue would be the degree of fault,

if any, on the part of the Government's agents"; and which would "require members of the Armed Services to testify in court as to each others' decisions and actions." *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977).[7]

Respondent's claim is a suit on behalf of a serviceman that explicitly challenges several military orders.[8] It therefore implicates these concerns in the most direct fashion. Specifically, respondent alleges that Shearer's superiors at Fort Bliss and elsewhere in the Army injured him because they: (i) "negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard," (ii) failed to "take any action to prevent [Heard] from endangering other person[s]," (iii) "failed to warn other persons that [Heard] was at large, and of the danger which he presented," and (iv) "negligently and carelessly failed to then remove Andrew Heard from active military duty." J.A. 14. Respondent thus seeks to have the courts inquire into basic decisions about the discipline, control, and discharge of another serviceman.

---

[7] This Court has recently reaffirmed the *Feres* doctrine (*Stencel Aero Engineering Corp.* v. *United States, supra*; see *Chappell* v. *Wallace*, No. 82-167 (June 13, 1983)) and Congress has shown no disposition to overturn it in the 34 years since *Feres* was decided. See H.R. Rep. 97-384 (Pt. I), 97th Cong., 1st Sess. 5 (1981). See also *The Feres Doctrine As It Relates to Private Claims: Hearings Before the Subcomm. on Agency Administration of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982).

[8] It is immaterial that the suit was brought not by the serviceman but by a party claiming on his behalf; *Feres* itself was a suit by the executrix of the injured serviceman. See 340 U.S. at 136-137. See also Pet. App. 25a n.1.

If the court of appeals' approach were to prevail, a serviceman could force commanding officers to justify, to a court, the officers' decisions about, for example, whether to overlook an incident in the barracks or to impose a disciplinary sanction; whether to delay the discipline or discharge of a serviceman who has acted improperly so as to give him an opportunity to correct his behavior; whether a serviceman is fit to serve despite previous wrongful actions; whether a serviceman should be physically restrained or subjected to other punishments; and whether morale would be damaged if servicemen were warned at a particular time about the possible behavior of another serviceman. These are principal examples of "'[t]he complex, subtle, and professional decisions as to the composition, training, * * * and control of a military force [that] are essentially professional military judgments'" (*Chappell* v. *Wallace*, No. 82-167 (June 13, 1983), slip op. 6, quoting *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973)), and that should not be second-guessed by a court at the behest of a serviceman.[9]

---

[9] The Eighth Circuit recently held that *Feres* barred a "negligent supervision" claim, similar to respondent's, that was brought on behalf of a member of the National Guard who had been the victim of a racially motivated intentional tort that occurred off duty. *Brown* v. *United States*, 739 F.2d 362 (1984), petition for cert. pending, No. 84-636. The court explained that such claims are precluded for the following reasons (739 F.2d at 368):

> The claim that various officers negligently failed to prevent the incident directly calls into question the disciplinary decisions of [the victim's] superior officers. Presumably what would be litigated is whether the officers should have issued some type of order, or otherwise taken disciplinary action, to prevent any type of racially

Moreover, the concerns underlying the *Feres* doctrine have special force where, as in this case, a serviceman challenges not just military decisions of general application but the specific way in which his superior officers have discharged their responsibilities to him. A central purpose of the *Feres* doctrine is to prevent "the disruption of '[t]he peculiar and special relationship of soldier to his superiors' that might result if the soldier were allowed to hale his superiors into court." *Stencel Aero Engineering Corp.*, 431 U.S. at 676 (Marshall, J., dissenting), quoting *Brown*, 348 U.S. at 112. Here, the court of appeals has allowed a serviceman's representative to hale the serviceman's superiors into court on the basis of a claim that they inadequately performed an important military duty—the duty to protect their subordinates—that they owed to the serviceman. As this Court has explained, Congress did not intend the courts to entertain claims that risk subverting the command relationship in this way:

> Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment.

Chappell, slip op. 4. See also *Jefferson* v. *United States*, 178 F.2d 518, 520 (4th Cir. 1949), aff'd *sub nom. Feres* v. *United States*, *supra* ("[E]ssential

---

motivated actions. Under the *Feres* doctrine such a lawsuit cannot be maintained—it strikes precisely at the type of command relationship between a service member and his or her superior officers that is at the heart of the military disciplinary structure.

military discipline would be impaired by subjecting the command to the public criticism and rebuke of any member of the armed forces who chose to bring a suit."). Cf. *Parker* v. *Levy*, 417 U.S. 733, 763 (1974) (Blackmun, J., concurring) ("The subtle airs that govern the command relationship are not always capable of specification.").[10]

---

[10] The Court in *Feres* identified two other bases for its decision. First, the Court noted that under the FTCA, liability depends on "the law of the place where the act or omission occurred" (28 U.S.C. 1346(b); see 28 U.S.C. 2674); by contrast, "[t]he relationship between the Government and members of its armed forces is 'distinctively federal in character'" and "has been governed exclusively by federal law" (340 U.S. at 143, 146; citation omitted). The Court reasoned that "it would make little sense to have the Government's liability to members of the Armed Services dependent on the fortuity of where the soldier happened to be stationed at the time of the injury." *Stencel Aero Engineering Corp.*, 431 U.S. at 671.

Second, the Court of *Feres* reasoned that because Congress, in enacting veterans' benefits statutes, had created "a comprehensive system of relief * * * for [servicemen] and their dependents" (340 U.S. at 140), Congress would not also have intended servicemen to recover under the FTCA for injuries incident to military service. See *id.* at 144; *Chappell*, slip op. 3. "[T]he Veterans' Benefits Act establishes as a substitute for tort liability, a statutory 'no fault' compensation scheme * * * * * [that] provides an upper limit of liability for the Government as to service-connected injuries." *Stencel Aero Engineering Corp.*, 431 U.S. at 671-673.

While neither of these concerns is dispositive in *Feres* cases, because the primary basis of *Feres* is the effect of servicemen's suits on military discipline (see *Chappell*, slip op. 3; *Muniz*, 374 U.S. at 162; *United States* v. *Brown*, *supra*), both of these concerns are important, and both are present here. It would be anomalous if the government's duties to supervise and to protect its servicemen were to depend on the local law of various states; such decisions must be made on a

2. The court of appeals avoided the obvious conclusion that respondent's claim is barred by *Feres* by stating that Shearer "was on leave in another state (New Mexico) when he was kidnapped" and "was not engaged in or acting incident to any military activity at the time of his murder" (Pet. App. 6a). But Shearer's location and status at the time of Heard's battery are immaterial, because—as the court of appeals emphasized in holding Section 2680(h) inapplicable—Heard's battery is not the actionable tort asserted in respondent's complaint.

The tortious acts alleged in respondent's complaint—and the only torts even arguably committed by any government employee within the scope of his employment—were the decisions made by Heard's and Shearer's military superiors with respect to the discipline, control, and discharge of Heard. Respondent's claim is that in making those decisions, the superior officers breached their duty of care toward Shearer. An injury suffered by a serviceman because his superior officers did not take reasonable care to protect him from a fellow serviceman is clearly an injury "incident to the military service" (*Brown*, 348 U.S. at 113); a claim based on that injury is therefore barred by *Feres*.

It is true that Shearer could not have become aware that he had suffered this injury, and perhaps did not have a cause of action, until Heard kidnapped him, an event that occurred while Shearer was off duty and off the base. But the basis of respondent's complaint is the breach of a duty that was

---

uniform, nationwide basis. And the record establishes that Shearer's dependents are fully entitled to statutory veterans' benefits. See J.A. 15; Pet. App. 28a-30a; 10 U.S.C. 1475, 1477, 1478; 38 U.S.C. 415 and 765.

allegedly owed to Shearer by virtue of his being a serviceman on active duty. The fact that some of the consequences of the alleged breach of duty occurred while Shearer was off duty does not lessen the threat posed to military discipline by respondent's effort to second-guess the way in which Shearer's superior officers discharged their duty to him. Accordingly, the courts of appeals have consistently held that if the government is alleged to have breached a duty of care to a serviceman, *Feres* bars the serviceman's claim. This is true even if the serviceman had not yet enlisted at the time of the breach of duty;[11] had left the service by the time the physical injury caused by the breach of duty became manifest;[12] or, as here, was off duty and off the base at the time he suffered the injury caused by his superiors' alleged negligence. See, *e.g.*, *Johnson* v. *United States*, 631 F.2d 34, 37 (5th Cir. 1980), cert. denied, 451 U.S. 1018 (1981) (serviceman's claim is barred by *Feres* because "all the government actions that resulted in [the serviceman's] death were directly and substantially related to his military service" even though "the damage did not manifest itself until [the serviceman] left the post").

---

[11] See, *e.g.*, *Yolken* v. *United States*, 590 F.2d 1303 (4th Cir. 1979); *Southard* v. *United States*, 397 F. Supp. 409 (E.D. Pa. 1975), aff'd, 535 F.2d 247 (3d Cir. 1976); *Joseph* v. *United States*, 505 F.2d 525 (7th Cir. 1974).

[12] See, *e.g.*, *Lombard* v. *United States*, 690 F.2d 215, 223-224 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983); *Laswell* v. *Brown*, 683 F.2d 261, 269 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983); *Monaco* v. *United States*, 661 F.2d 129, 133 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982); *Henning* v. *United States*, 446 F.2d 774, 777 (3d Cir. 1971), cert. denied, 404 U.S. 1016 (1972).

For these reasons, the court below erred in concluding (Pet. App. 5a-7a) that this case resembles *Brooks* v. *United States*, 337 U.S. 49 (1949). *Brooks* held that an off-duty serviceman can sue under the FTCA for injuries sustained in an off-base automobile accident with a military vehicle. But in *Brooks*, the duty breached by the military driver was not a duty owed to the plaintiff because he was a serviceman but a duty owed equally to all members of the general public. As the Court explained (337 U.S. at 56): "[W]e are dealing with an accident which had nothing to do with [the plaintiffs'] army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired." Consequently, in *Brooks* the Court was asked to determine only whether the military had exercised the proper degree of care in taking actions that affected the public at large (cf. *Laird* v. *Tatum*, 408 U.S. 1, 15-16 (1972)); the claim in *Brooks*, unlike respondent's claim, would not have required courts to second-guess a military decision about the degree of care to be shown to a serviceman by his superior officers.[13]

[13] It is clear that this is the correct characterization of respondent's claim. For example, the complaint alleges that the Army's actions were unreasonable "given the great danger potential that [Heard] posed to other active duty service members, none of whom were warned of the dangers" (J.A. 14). Indeed, a principal negligent act alleged by respondent, and the alleged act most strongly emphasized by the court of appeals (see Pet. App. 3a, 9a), was the Army's alleged failure to discharge Heard as quickly as it should have. See Br. in Opp. 11 (respondent's "action is premised on the failure of Government officials to separate Private Heard from military service once they learned that he was unfit for such service"). The only duty that could possibly have been breached by this failure was a duty owed to Heard's fellow servicemen—not a duty owed to members of the general public, who are, if anything, placed in greater peril when a dangerous serviceman is discharged.

In any event, we submit that *Feres* should bar respondent's claim even if respondent attempts to revise it to allege only a breach of duty owed to members of the general public. In *Brooks*, the plaintiff asserted only that a military driver was negligent. Here, by contrast, a serviceman has called upon courts to review a much more sensitive category of military decisions. As a practical matter, such a claim will have the damaging effects on military discipline that *Feres* is intended to prevent, whether or not the serviceman attempts to confine his claim by asserting that he is suing not as a serviceman but merely in his capacity as a member of the public.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
ROBERT V. ZENER
Attorneys

JANUARY 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 461531 10135

Office-Supreme Court, U.S.
FILED
JAN 28 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-194

In the Supreme Court of the United States

October Term, 1984

UNITED STATES OF AMERICA,

Petitioner,

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENT LOUISE SHEARER

William T. Cannon, Esquire
Suite 1500, Robinson Building
42 South 15th Street
Philadelphia, PA 19102
(215) 564-4448

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS PRESENTED

1. Whether the survivor of a serviceman who was murdered by a fellow serviceman, while both were off duty and off the military reservation in another state off base, may sue the government for damages under the Federal Tort Claims Act, notwithstanding the intentional tort exception, where military personnel are on notice concerning the offending serviceman's dangerous propensities and were negligent in failing to remove him from the military, supervise his activities, or warn persons in the position of plaintiff's decedent of his propensities.

2. Whether such a suit, alleging that negligence on the part of the serviceman's superior officers and Department of the Army civilians caused the death of plaintiff's decedent, is precluded by the doctrine of *Feres v. United States,* 340 U.S. 135 (1950), which bars suits by servicemen for torts incident to military service.

TABLE OF CONTENTS

	Pages
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT	3
SUMMARY OF ARGUMENT	6
ARGUMENT:	
A. The Intentional Tort Exception To The Federal Tort Claims Act Does Not Bar Respondent's Claim	8
B. Respondent's Claim Is Not Barred By The Feres Doctrine	23
CONCLUSION	39

TABLE OF AUTHORITIES

CASES:

Abdallah v. Caribbean Security Agency, 557 F.2d 61	15
Anderson v. John L. Hayes Construction Company, 243 N.Y. 140	9
Andrews v. United States, 732 F.2d 366	14
Arrendale v. United States, 469 F. Supp. 883	32
Barnes v. United States, 103 F. Supp. 51	29
Beaucoudray v. United States, 490 F.2d 86	28
Belotte v. Zayre Corporation, 531 F.2d 1100	15
Bergman v. United States, 565 F. Supp. 1353	23

TABLE OF AUTHORITIES—Continued

	Pages
Bergmann v. United States, 526 F. Supp. 443	20
Bonsignore v. City of New York, 683 F.2d 635	15
Bridgford v. United States, 550 F.2d 978	32
Brooks v. United States, 337 U.S. 49	24, 25, 28, 29, 37
Broudy v. United States, 661 F.2d 125	33
Brown v. United States, 739 F.2d 362, petition for cert. pending No. 84-636	35
Bryson v. United States, 463 F. Supp. 980	20, 29, 30, 34, 35
Chappell v. Wallace, — U.S. —, 103 S.Ct. 2362	31, 32, 36
Cooper Stevedoring Company v. Kopke, Inc., 417 U.S. 106	38
Cruz v. United States, 715 F.2d 463	32
Downs v. United States, 522 F.2d 990	34
Doyle v. Exxon Corporation, 592 F.2d 44	15
Everett v. United States, 492 F. Supp. 318	33
Fair v. United States, 234 F.2d 288	19
Federal Housing Administration v. Burr, 309 U.S. 242	9
Feres v. United States, 340 U.S. 135	passim
Gibson v. United States, 457 F.2d 1391	14, 17, 34, 35
Gilligan v. Morgan, 413 U.S. 1	33, 36

TABLE OF AUTHORITIES—Continued

Pages

Hand v. United States, 260 F. Supp. 38 29

Harrison v. Missouri Pacific Railroad Company, 372 U.S. 248 18

Harten v. Coons, 502 F.2d 1363, cert. denied, 420 U.S. 963 ..... 29, 31

Hatzlachh Supply Co. v. United States, 444 U.S. 460 5

Hicks v. United States, 511 F.2d 407 ..... 14, 19

Hinkie v. United States, 715 F.2d 96 24

Hughes v. United States, 662 F.2d 219, aff'g *Hughes v. Sullivan,* 514 F. Supp. 667 22

Hunt v. United States, 636 F.2d 580 24

Indian Towing Company v. United States, 350 U.S. 61 10

Jablonski by Pahls v. United States, 712 F.2d 391 ..... 14, 15, 20

Johnson v. United States, 704 F.2d 1431 ..... 29, 34

Knecht v. United States, 144 F. Supp. 786, aff'd 242 F.2d 929 ..... 29, 30, 36

Kohn v. United States, 680 F.2d 922 ..... 16, 17, 36

Kosak v. United States, — U.S. — 104 S.Ct. 1519 ..... 11, 12

Lillie v. Thompson, 332 U.S. 459 18

Liuzzo v. United States, 508 F. Supp. 923 ..... 20, 23

Loritts v. United States, 489 F. Supp. 1030 ..... 20, 23

Mason v. United States, 568 F.2d 1135 28

TABLE OF AUTHORITIES—Continued

Pages

Miliken v. United States, 439 F. Supp. 290 29

Mills v. Tucker, 499 F.2d 886 ..... 29, 36

Moore v. United States, 249 U.S. 487 9

Muniz v. United States, 305 F.2d 285, aff'd in *United States v. Muniz,* 374 U.S. 150 13

Naisbitt v. United States, 611 F.2d 1350, cert. denied, 449 U.S. 885 22

Panella v. United States, 216 F.2d 622 ..... 9, 16, 23

Parker v. United States, 611 F.2d 1007 ..... 30, 32, 36, 38

Payton v. United States, 679 F.2d 475 19

Peluso v. United States, 474 F.2d 605, cert. denied, 414 U.S. 879 24

Rich v. United States, 144 F. Supp. 791 29

Rodgers v. United States, 397 F.2d 12 ..... 14, 20

Rulli v. United States, 581 F. Supp. 1502 34

Sapp v. United States, 153 F. Supp. 496 29

Scales v. United States, 685 F.2d 970 24

Schwartz v. United States, 230 F. Supp. 536 33

Sosa v. Coleman, 646 F.2d 991 15

Steele v. United States, 463 F. Supp. 321 32

Stencel Aero Engineering Corporation v. United States, 431 U.S. 666 ..... 5, 27, 32, 33, 37

Stephan v. United States, 490 F. Supp. 323 30

Thornwell v. United States, 471 F. Supp. 344 33

Underwood v. United States, 356 F.2d 92 ..... 14, 18

United States v. Brown, 348 U.S. 110 ..... 24, 25, 27, 28, 37

United States v. Michel, 282 U.S. 656 9

TABLE OF AUTHORITIES—Continued

	Pages
United States v. Shaw, 309 U.S. 495	9
United States v. Sherwood, 312 U.S. 584	9
United States v. Shively, 345 F.2d 294, cert. denied, 382 U.S. 883	22
United States v. Standard Oil Company, 332 U.S. 301	37
United States v. Yellow Cab Company, 340 U.S. 543	9
Veillette v. United States, 615 F.2d 505	24
Watkins v. United States, 462 F. Supp. 980, aff'd per curiam, 587 F.2d 279	28
Watt v. United States, 246 F. Supp. 386	28
West v. United States, 729 F.2d 1120	33, 34
White v. United States, 317 F.2d 13	14, 18, 19, 34
Williams v. United States, 435 F.2d 804	32
Wine v. United States, 705 F.2d 366	22
Woodside v. United States, 606 F.2d 141	31
Zoula v. United States, 217 F.2d 81	28, 30

STATUTES:

Federal Tort Claims Act:

28 U.S.C. 1254(1)	2
28 U.S.C. 1346(b)	2, 3, 24, 37
28 U.S.C. 2671 *et seq.*	3
28 U.S.C. 2674	24, 25, 26, 27
28 U.S.C. 2680	2

TABLE OF AUTHORITIES—Continued

	Pages
28 U.S.C. 2680(a)	33
28 U.S.C. 2680(c)	12
28 U.S.C. 2680(h)	passim

MISCELLANEOUS:

Annot., 31 A.L.R. Fed. 146 (1977)	27
Boger, Gitenstein & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C.L. Rev. 497 (1976)	12
Hitch, *The Federal Tort Claims Act and Military Personnel*, 8 Rutgers L.Rev. 316 (1954)	24
L. Jayson, *Handling Federal Tort Claims* (1964; Supp. 1979)	27
Myers, *The Feres Doctrine: Has It Treated Remediless Wrongs For Relatives of Service-members?* 44 U. of Pitt. L.Rev. 929 (1983)	26
Note, *From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?* 77 Mich. L.Rev. 1099 (1979)	24
Note, *The Effect of the Feres Doctrine On Tort Actions Against the United States By Family Members of Servicemen*, 50 Fordham L.Rev. 1241 (1981-82)	25
Pub.L.No. 93-253, § 2, 88 Stat. 50	12
Restatement of Torts, Second § 448 (1965)	14
Rhodes, *The Feres Doctrine After Twenty-five Years*, 18 A.F.L. Rev. 24 (1976)	24
S. Rep. No. 1400, 79th Cong., 2nd Sess. (1946)	11

No. 84-194

—o—

In the Supreme Court of the United States

October Term, 1984

—o—

UNITED STATES OF AMERICA,

Petitioner,

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED,

Respondent.

—o—

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

—o—

BRIEF FOR THE RESPONDENT LOUISE SHEARER

—o—

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 723 F.2d 1102. The statements on denial of rehearing (Pet. App. 34a-36a) are reported at 729 F.2d 266. The opinion of the district court (Pet. App. 24a-30a) is reported at 576 F. Supp. 672.

JURISDICTION

The judgment of the court of appeals (Pet. App. 32a-33a) was entered on December 19, 1983. A petition for rehearing was denied on March 7, 1984 (Pet. App. 33a-36a). On June 4, 1984, Justice Brennan extended the time in which to file a petition for a writ of certiorari to August 4, 1984. The petition was filed on August 2, 1984, and was granted on October 29, 1984. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

28 U.S.C. 1346(b) provides in part:

> Subject to the provisions of [28 U.S.C. 2671-2680], the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2680 provides in part:

> The provisions of [28 U.S.C. 2671-2680] and § 1346(b) of this title shall not apply to—
>
> * * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and § 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

STATEMENT

1. Respondent is the mother and administratrix of a serviceman, Private Vernon Shearer, who was stationed at Fort Bliss, Texas. While Shearer was off duty and off the base, he was kidnapped and murdered by another serviceman, Private Andrew Heard, who was also stationed at Fort Bliss and was also off duty at the time. This crime occurred in Otero County, New Mexico, which is adjacent to Fort Bliss. Pet. App. 2a-3a; J.A. 5, 7. Heard was convicted of Shearer's murder in a New Mexico state court and sentenced to a term of 15 to 55 years' imprisonment (Pet. App. 22a; J.A. 13).

Respondent subsequently brought this action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2671 *et seq.*, seeking damages from the United States. She claimed that the Army's negligent failure to prevent Heard from murdering Shearer was responsible for Shearer's death. Specifically, respondent alleged (J.A. 14):

> 40. The United States Government, acting through its Department of the Army, * * * negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard, or take any action to prevent him from endangering other people, in spite of the [government's] knowledge of his dangerous and murderous propensities, and further failed to warn other persons that he was at large, and of the danger which he presented.
>
> 41. The United States Government, acting through its Department of the Army, * * * negligently and carelessly failed to then remove Andrew Heard from active military duty, in spite of its knowledge of his dangerous and murderous propensities, with a reasonable degree of promptness given the great danger potential that he posed to other active duty service members, including [Shearer], none of whom were warned of the dangers posed.

Respondent asserted that in 1977, while Heard was assigned to an Army base in Germany, he was convicted by a German court of manslaughter and sentenced to a four-year prison term. In February 1979, when German authorities granted Heard an early release from that term, the Army promptly removed him from Germany and transferred him to Fort Bliss. By the time Heard killed Shearer, in June 1979, several Army Superiors had recommended that Heard be discharged. J.A. 10-11.

2. The United States District Court for the Eastern District of Pennsylvania granted summary judgment in favor of the government (Pet. App. 24a-32a). The district court did not address the government's contention that respondent's claim is barred by 28 U.S.C. § 2680(h), the intentional tort exception to the FTCA, which provides in part that the government is not liable for "[a]ny claims

arising out of assault [or] battery." See Pet. App. 29a n.4. Instead, the court ruled that respondent's claim is precluded by *Feres v. United States,* 340 U.S. 135 (1950), which held that a serviceman may not sue the government under the FTCA for alleged torts incident to military service.

The district court stated that under *Feres,* the "question is not whether decedent was engaged in activity incident to military service when he incurred his injuries. Rather, the 'focus . . . is upon when and how the negligent act occurs'" (Pet. App. 26a (citation and emphasis omitted)). The court reasoned that because respondent "allege[d] that the Army was negligent in failing to exert reasonable control over" Heard, respondent's claims "relate directly to decisions of military personnel made in the course of the performance of their military duty and, therefore, are barred by *Feres*" (*ibid.*). The district court also noted that respondent is entitled to receive veterans' benefits (*id.* at 29a) and explained that "the existence of a no fault compensation scheme" for servicemen, veterans, and their survivors is another reason to apply the *Feres* doctrine (Pet. App. 28a-29a, citing *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 673 (1977), and *Hatzlachh Supply Co. v. United States,* 444 U.S. 460, 464-465 (1980)).

3. A divided panel of the court of appeals reversed (Pet. App. 1a-23a). The court of appeals overturned the district court's ruling that *Feres* bars respondent's claim, explaining that "[g]enerally, an off-duty serviceman not on the military base and not engaged in military activity at the time of injury, can recover under FTCA" (Pet.

App. 5a-6a) and that "being kidnapped off base at gun point can never be perceived as one of the activities or anticipated * * * benefits of being in the armed services" (*id.* at 7a; emphasis omitted).

The court of appeals also held that the intentional tort exception to the FTCA does not bar respondent's claim. The court noted that respondent's complaint alleged that the government was negligent and reasoned that "if an assault and battery occurred as a 'natural result' of the government's failure to exercise due care, the assault and battery may be deemed to have its roots in negligence and therefore it is within the scope of the FTCA" (Pet. App. 8a). Specifically, the court stated that the intentional tort exception would not preclude the claim of a plaintiff who "allege[d] sufficient facts which, if proven, would demonstrate that the government should have reasonably anticipated that one of their employees would commit an intentional tort" (*ibid.*). The court ruled that respondent's claim satisfied this standard because respondent alleged that the Army knew of Heard's "violent propensities" and that "[n]evertheless, Heard remained in the Army and was treated as a member in good standing * * * [and] enlisted men, including Shearer, were not warned about his violent past or present disposition" (*id.* at 9a).

The court of appeals denied rehearing en banc by a vote of 6-4 (Pet. App. 33a-36a).

—o—

SUMMARY OF ARGUMENT

I. The assault and battery exception to the Federal Tort Claims Act, 28 U.S.C. § 2680 (h), does not bar respondent's claim. Respondent's claim does not arise out of Heard's

killing of Shearer. Respondent's claim is based on the negligence of the government in failing to remove Heard from the Military Service following his conviction for killing a woman while part of the Armed Forces in Germany and in failing to warn other servicemembers of Heard's dangerous propensities.

The Court of Appeals' approach does not thwart the purpose of the intentional tort exception to the FTCA since the latter was intended to preclude only respondeat superior liability on the part of the government for intentional torts and not to frustrate the intent of Congress to permit recovery against the Government for negligent and wrongful acts or omissions where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Where the claimant, as here, demonstrates actionable negligence on the part of the government, the Federal District Court has jurisdiction over the case notwithstanding the fact that that negligence proximately and foreseeably culminates in an act of assault and battery. While the assault and battery on Shearer is undeniably part of the damages for which compensation is sought, the essence of respondent's claim is based on negligence. Merely because that negligence culminates in an assault and battery does not bar the claim under the Federal Tort Claims Act.

II. Respondent's claim is not barred by the doctrine of *Feres v. United States*, 340 U.S. 135 (1950). Neither the murder of respondent's decedent nor the negligence of the government which gave rise to the instant claim may be characterized as incident to Shearer's military service. Furthermore, respondent seeks not to second-guess the

decisions of superior officers, but merely the review of the application of policy to the specific failure to remove Heard from the Service. Such a claim poses little, if any, threat to military discipline and to the peculiar and special relationship of servicemembers to their superiors.

ARGUMENT

A. THE INTENTIONAL TORT EXCEPTION TO THE FEDERAL TORT CLAIMS ACT DOES NOT BAR RESPONDENT'S CLAIM.

Respondent's claim, which is based on the military's failure to separate Heard from the active service, its failure to supervise or control the activities of Heard, and its failure to warn others of Heard's propensity for violence, is not barred by the intentional tort exception to the FTCA, 28 U.S.C. § 2680 (h).

While the government correctly quotes the "express words" of the FTCA (Government's Brief at page 8), it ignores the legislative history of the Act, and more importantly, the nature and substance of respondent's claim.

The FTCA was enacted so as to extend a remedy to those who had been without. *Feres v. United States,* supra. It must be kept in mind that:

> . . . The present Tort Claims Act represents 'the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit.' See *Feres v. United States,* 340 U.S. 135 at page 139, 71 S.Ct. 153, at page 156, 95 L.Ed. 152. In construing the language of the Act, we should on the one hand, give full scope to the Government's relinquishment of its historic immunity from suit, and on the other hand, avoid narrowing the provisions which set forth situations in which Congress has seen fit to retain that immunity. Our object should be to read the Act so as to make it 'consistent and equitable'. *Feres,* 340 U.S. at page 139, 71 S.Ct. at page 156, in which we should be untrammeled by any rule of 'strict' or 'liberal' construction. *Panella v. United States,* 216 F.2d 622 (2d Cir. 1954).[1]

In considering the applicability of the assault and battery exception of the FTCA to Respondent's claim, this Court must bear in mind the approach toward FTCA interpretations reflected in *United States v. Yellow Cab Company,* 340 U.S. 543, 554 (1951):

> We think that the congressional attitude in passing the Tort Claims Act is accurately reflected by Judge Cardozo's statement in *Anderson v. John L. Hayes Construction Company,* 243 N.Y. 140, 147, 153 N.E. 28, 29-30: "The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced".

Where a statute contains a clear and sweeping waiver of United States immunity from suit on all negligence

---

[1] *Moore v. United States* 249 U.S. 487 (1919), construing a statute waiving immunity from patent infringement suits, stated in dictum: "The act of Congress must be read 'according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation.'" In the absense of Congressional direction on whether the statute should be strictly or liberally construed, this appears to us the soundest rule, especially since statements that waivers of immunity are to be strictly construed—see *United States v. Sherwood,* 312 U.S. 584, 590 (1941); *United States v. Michel,* 282 U.S. 656, 659, 660 (1931)—are offset by statements that in line with current disfavor of the doctrine of sovereign immunity, at least some such waivers are to be liberally construed—see *United States v. Shaw,* 309 U.S. 495, 501 (1940); *Federal Housing Administration v. Burr,* 309 U.S. 242, 245 (1940).

claims, with certain well-defined exceptions, resort to rules of strict construction cannot be had in order to enlarge the exceptions. The broad and just purpose which the FTCA was designed to effect was to compensate victims of negligence in the conduct of governmental activity in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. *Indian Towing Company v. United States,* 350 U.S. 61 (1955).

The Government's contention that respondent's claim arises out of an assault and battery represents a misapprehension or deliberate distortion of the claim. The respondent's claim is not based on Heard's unprovoked murder of Shearer, but is premised on the military's negligent acts of omission. Specifically, the claim is based on the Military's failure to:

1. separate Heard from the Military Service following his release from custody in Germany after serving a prison sentence for killing a German citizen;

2. control or supervise the activities of Heard following his release from custody so as to prevent yet a second murder; and

3. warn others in the position of respondent's decedent of Heard's proclivities for assaultive behavior.

The intentional tort exception to the FTCA was not intended to defeat such a cause of action. Section 2680 (h) of the FTCA renders Federal District Courts without jurisdiction to consider claims arising out of deliberate torts

such as assault and battery, but not claims based on negligence. S.Rep.No. 1400, 79th Cong., 2d Sess., at 33 (1946).[2]

The Government relies on *Kosak v. United States,* — U.S. —, 104 S.Ct. 1519 (1984), to bolster its interpretation

---

[2] In the hearings before the Committee on the Judiciary, House of Representatives, the following colloquy occurred with respect to this exception:

"MR. ROBSION. On that point of deliberate assault that is where some agent of the Government gets in a fight with some fellow?

MR. SHEA. Yes.

MR. ROBSION. And socks him?

MR. SHEA. That is right.

MR. CRAVENS. Assume a C.C.C. automobile runs into a man and damages him then under the common law, where that still prevails, is not that considered an assault and is not the action based on assault and battery?

MR. SHEA. I should think not. I should think under old common law rather that would be trespass on the case.

MR. CRAVENS. Trespass on the case?

MR. SHEA. Yes.

MR. CRAVENS. I do not remember those things very well, but it seems to me there are some cases predicated on assault and battery even though they were personal injury cases.

MR. SHEA. No: I think under common law pleading you have the same writ, but it makes a distinction between an assault and negligence.

MR. CRAVENS. This refers to a deliberate assault?

MR. SHEA. That is right.

MR. CRAVENS. If he hit someone deliberately?

MR. SHEA. That is right.

MR. CRAVENS. It is not intended to exclude negligent assaults?

MR. SHEA. No. *An injury caused by negligence could be considered under the bill."* (Emphasis supplied.) Hearings on H.R. 5373 and H.R. 6463 Before the House Committee of the Judiciary, 77th Cong., 2nd Sess., ser. 13, at 33, 34 (1942).

of the FTCA (Government's Brief at page 9). *Kosak,* however, is readily distinguishable. In *Kosak* a claim was made for physical damage to property which was in the custody of the Customs Service. The FTCA specifically excepts from liability "[a]ny claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs." 28 U.S.C. § 2680(c). Claimant contended that this exception applied only to loss of value occasioned by the wrongful detention of property and not to physical damage to property. This Court rejected this contention holding that the section "sweep[s] within the exception all injuries associated in any way at all with the detention of goods."

Kosak, however, provides no support for the Government's position in this matter. In *Kosak,* the claim was directly based on the loss of or damage to goods in the custody of custom service officials. The claimant sought to interpret the statute so as to create an exception to the exception which, in reality, amounted to a distinction without any difference. Herein, respondent's cause of action does not arise out of Heard's killing of Shearer, but from the Military's negligent failure to rid itself of or to warn of the menace Heard posed to other servicemembers in the position of respondent's decedent.

The Government cannot attempt to take refuge in Congress' 1974 amendment to the FTCA permitting suits for certain intentional torts by law enforcement officers Pub.L.No. 93-253, § 2, 88 Stat. 50 (Government's Brief at page 17). This amendment was aimed at illegal drug enforcement raids carried out by federal narcotics agents. Boger, Gitenstein and Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative An-*

alysis, 54 N.C.L. Rev. 497 (1976). The amendment permitted claims for intentional torts based on a theory of respondeat superior otherwise barred by the intentional tort exception. There is no indication in the history of the amendment that a claim based on the negligent retention or supervision of federal narcotics agents would have otherwise been barred under the unamended FTCA. The amendment was enacted, no doubt, in response to the recurring problem of illegal raids, and the unfairness of requiring, in every instance, a victim to prove negligence before recovery would be permitted. The effect of the amendment is to permit claimants who are victimized by illegal acts of law enforcement officials to base their actions not only in negligence, but respondeat superior as well.

Ironically, the amendment permitting respondeat superior claims provides support for respondent's theory that claims of negligent supervision are not barred by § 2680(h). Only in this one specific situation did Congress see fit to provide a remedy for intentional torts based on vicarious liability. The amendment reflects the concern of Congress over the government's immunity from vicarious liability for intentional torts in the enactment of § 2680(h), and not direct liability for the negligent and wrongful conduct of Government employees. *Muniz v. United States,* 305 F.2d 285 (2d Cir. 1962), aff'd in *United States v. Muniz,* 374 U.S. 150 (1963).

The Government broadly proclaims that: "thus, an allegation of 'negligent supervision' would, under the Court of Appeals' approach, automatically enable any person injured by a government employees' intentional tort to hold the government responsible" (Government's Brief at page

10). This conclusion is only partly correct. To begin with, an FTCA action for negligent supervision has been recognized by the Courts. In *Andrews v. United States,* 732 F.2d 366 (4th Cir. 1984), suit was instituted by a patient as a result of the physician's assistant's use of sexual intercourse as a method of treatment. The Court ruled that the District Court properly exercised jurisdiction over the action as it related to the physician's negligent supervision and failure to provide an adequate treatment program which permitted the physician's assistant to seduce the patient.

Secondly, a mere allegation of negligent supervision, pleaded in conclusory fashion, will never be sufficient to permit recovery against the government. *Gibson v. United States,* 457 F.2d 1391 (3d Cir. 1972). In order to establish a valid claim under the FTCA in this context more than mere conclusory allegations must be made. A party claimant must plead not only the lack of negligent supervision, as well as the Government's advance knowledge of the background of its employee which should have triggered special precautions, but also that its negligence proximately and foreseeably caused the harm.

Finally, and recognizably, the mere fact that an intentional tort is in the background of a claim is not a bar since the Government can be held liable for creating the situation which culminated in the commission of an intentional act.[3] Under the Restatement of Torts, Second, § 448 (1965), Page 480:

---

[3] *Jablonski by Pahls v. United States,* 712 F.2d 391 (9th Cir. 1983); *Gibson v. United States, supra; White v. United States,* 317 F.2d 13 (4th Cir. 1963); *Underwood v. United States,* 356 F.2d 92 (5th Cir. 1966); *Hicks v. United States,* 511 F.2d 407 (D.C. Cir. 1975); *Rodgers v. United States,* 397 F.2d 12 (4th Cir. 1968).

> "The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime."

It is well established that the negligence of a defendant which leads predictably, proximately, and foreseeably to the commission of a criminal act is actionable. *Bonsignore v. City of New York,* 683 F.2d 635 (2d Cir. 1982); *Doyle v. Exxon Corporation,* 592 F.2d 44 (2nd Cir. 1979); *Abdallah v. Caribbean Security Agency,* 557 F.2d 61 (3d Cir. 1977); *Belotte v. Zayre Corporation,* 531 F.2d 1100 (1st Cir. 1976); *Sosa v. Coleman,* 646 F.2d 991 (5th Cir. 1981).

FTCA suits based on claims of negligence, where, as here, that negligence culminated in an act of assault and battery, have been recognized not only by the Third Circuit, but by the Second, Fourth, Fifth, Ninth and District of Columbia Circuits as well.

In *Jablonski by Pahls v. United States,* supra, plaintiff sued under the FTCA for the wrongful death of her mother. The Plaintiff alleged that veterans administration psychiatrists engaged in malpractice by failing to involuntarily commit a man with whom decedent was living and who eventually murdered her. More specifically, plaintiff's suit was based on the psychiatrist's malpractice in failing to record and communicate a police warning concerning the murderer's prior criminal record, a series of

obscene phone calls which he had placed, and damage which he had maliciously perpetrated; failure to obtain medical records concerning the man's previous hospitalization; and the failure to warn the mother concerning the danger posed by the individual. The Court held that the suit was not barred by the assault and battery exception to the FTCA:

> The government attempts to distinguish the decisions holding that the assault and battery exception does not bar suits for negligence. It asserts that each of these cases concerned a plaintiff who was committed to the custody of the government, either as a prisoner or a patient. This distinction is not meaningful. It is more significant that these cases, like the one before us, are based on negligence, not on assault and battery. Moreover, it seems likely that the policy underlying subsection 2680(h) was to insulate the government from liability for acts it was powerless to prevent or which would make defense of a lawsuit unusually difficult. *See Panella v. United States, supra,* 216 F.2d at 625-26. Meghan's suit is based on the negligence of government employees that could have been prevented by an exercise of due care. We hold that Meghan's suit is not precluded by subsection 2680(h). *Id.* at 395.

In *Kohn v. United States,* 680 F.2d 922 (2d Cir. 1982), an Army private first class was shot to death by a fellow servicemember. An action was instituted by the parents of the deceased servicemember based on the military's:

> a. suppression of information from and release of fraudulent information to the parents;
>
> b. coercing the parents into agreeing to an autopsy in violation of their religious beliefs;
>
> c. negligent advice to the parents that their son died as the result of an accidental shooting;
>
> d. negligent loss and/or destruction of the servicemember's personal effects;

> e. negligent failure to provide an honor guard for the servicemember's burial;
>
> f. wrongful sending of a copy of the servicemember's autopsy report, complete with photographs, to his parent's home.

In permitting the claim the Court held that it was not barred by § 2680(h) since the alleged wrongful acts were completely independent of the intentional misconduct which led to the servicemember's death. Though not a case in which an intentional tort was held not to be the superseding cause of injury, but the proximate and foreseeable consequence of the negligence, *Kohn* is a case where recovery was permitted notwithstanding the catalyst of an act of assault and battery on the plaintiff's decedent by a fellow servicemember.

In *Gibson v. U.S.,* supra, a corporate employee, who had been hired to train Job Corps enrollees, one of whom was a juvenile delinquent with a known addiction to narcotics, assaulted the plaintiff while he was engaged in the performance of his duties. In plaintiff's complaint he alleged that the injury arose out of the basic negligence of the United States in that the attack was the foreseeable consequence of the original misconduct. The Court ruled that the matter did not fall within the intentional tort exception of the FTCA and stated:

> . . . [T]he attack upon Gibson was a foreseeable consequence of the Government's failure to exercise due care under the circumstances and, therefore, it is not such an intervening act as will sever the necessary causal relation between the negligence and the appellant's injuries.
>
> Here the very risk which constitutes the defendant's negligence is the probability of such action. It is clear

that when such action occurs, it should not insulate the defendant's negligence under the causation formula. In other words, it is clearly unsound to afford immunity to a negligent defendant because the intervening force, the very anticipation of which made his conduct negligent, has brought about the expected harm.

Under the appellant's allegations, the injury arose out of the basic negligence of the United States and the attack was the foreseeable consequence of the original misconduct. "That the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. *Breach of that duty would be negligence.* . . ." (Emphasis supplied.) Lillie v. Thompson, 332 U.S. 459, 462 (1947); Harrison v. Missouri Pacific R. Co., 372 U.S. 248 (1962). Under such circumstances, the attack was not an intervening act and the tort did not arise out of the assault and battery. It had its roots in the Government's negligence.

In *White v. United States,* supra, a veteran at a hospital allegedly committed suicide. Suit was brought for wrongful death, alleging that the hospital had been negligent by allowing him to roam freely rather than confining him more closely. Plaintiff claimed that the decedent's medical files contained a history of suicidal tendencies, and that if the doctors had consulted those files, they would have restricted the decased's movement to a much greater extent. The Court ruled that the District Court had properly exercised jurisdiction over the claim.

In *Underwood v. United States,* supra, a member of the Air Force who had received care at the base psychiatric clinic, shot and killed his former wife. In a subsequent suit for damages, plaintiff claimed that the United States was negligent in allowing the patient to obtain a gun, arguing that the patient's return to duty should have

been subject to the restriction that he not be allowed to receive weapons. 356 F.2d at 94. As in *White v. United States,* supra, the essence of the complaint was that the doctors had been negligent in making a decision based on incomplete knowledge of the facts pertaining to the patient. The decedent had informed military personnel that her husband had threatened her, and this information was provided to one of the doctors treating the patient. However, a second doctor, who assumed responsibility for the patient, and who ultimately ordered his release, was never apprised of the threats. Again, the Court ruled that the District Court has properly exercised jurisdiction over the claim.

In *Payton v. United States,* 679 F.2d 475 (5th Cir. 1982), the Plaintiff's decedent was murdered by a federal prisoner who had been released on parole. The Court ruled that § 2680(h) did not bar the action which was based on the United States Bureau of Prison's failure to supply the United States Parole Board with records showing that the federal prisoner was a dangerous psychotic and a menace to society.

In *Fair v. United States,* 234 F.2d 288 (5th Cir. 1956), the tortfeasor was in the service. He was an Air Force Captain with known homicidal tendencies. He was also a patient in a government psychiatric hospital. He shot and killed a student nurse whom he had previously threatened. The action against the government claimed that he had been released from the hospital with knowledge of his propensities. The Court found that the District Court had properly exercised jurisdiction over the claim.

In *Hicks v. United States,* supra, liability was imposed on a government hospital when it failed to inform a court

of the actual condition of a patient it intended to release. The patient, after being released, shot and killed his wife, an act termed foreseeable.

In *Rodgers v. United States,* supra, plaintiff, a probationer, was subjected to torture by a man of unsavory reputation to whom he was exposed at night during a period in which a marshal was ordered by the Court to provide plaintiff with transportation to his home. The Court ruled that 28 U.S.C. § 2680(h) was inapplicable: "If there was a valid claim here, it is founded on negligence even though assault and or false imprisonment may be collaterally involved."[4]

Any attempt to distinguish these cases based on the fact that the tortfeasor therein was committed to the custody of the government as a prisoner or a patient and thus the government assumed a special duty to protect him and/or supervise his activities (Government's Brief at page 24) must fail. Such a distinction is not meaningful since the actions are based, as in the instant case, on negligence, not vicarious liability. *Jablonski by Pahls,* supra, at 395

---

[4] See also *Bergmann v. United States,* 526 F. Supp. 443 (E.D. Mo. 1981) (claim based on government's negligence in placing participant in a witness protection program without taking measures to prevent him from engaging in criminal activities which resulted in the murder of a police officer allowed); *Liuzzo v. United States,* 508 F.Supp. 923 (E.D. Mich. 1981) (Claim based on the negligent hiring, training and supervision of an F.B.I. informant which eventually led to the murder of a civil rights worker allowed); *Loritts v. United States,* 489 F.Supp. 1030 (D.C. Mass. 1980) (claim brought by a member of a female choral group who was raped by a West Point Academy Cadet while walking on the campus permitted); *Bryson v. United States,* 463 F.Supp. 908 (E.D. Pa. 1978) (claim based on the military's failure to remove a servicemember who eventually murdered decedent who was trying to remove the servicemember from an Army barracks men's room).

("Moreover, it seems likely that the policy underlying subsection 2680(h) was to insulate the government from liability for acts it was powerless to prevent or which would make defense of a lawsuit unusually difficult"). The Government *is* powerless to prevent intentional torts by its employees and the defense of such cases, if allowed, *would* be difficult. The essence of those Circuit Court holdings which have permitted recovery against the Government for negligent acts or omissions predictably and proximately linked to a criminal act is that but for that primary and preventable negligence the intentional tortfeasor would never have been provided with an opportunity to injure, maim, or kill, and that to deny recovery would be to provide the Government with no incentive at all to cure its negligent acts.

Similarly, the Government's attempted distinction between assaults committed by government employees versus non-government employees (Government's Brief at page 22) must also fail. In this case the essence of plaintiff's claim is that it was the negligence of the government's employees which proximately resulted in Shearer's death. The essence of plaintiff's claim is not changed merely because the foreseeable assault is committed by a government employee instead of a third party. The Government has waived sovereign immunity for its employees' negligent acts. Admittedly, it has retained sovereign immunity for its employees' intentional torts. But the Government cannot vest the District Court with jurisdiction over the former and assert that it is powerless to deal with the latter where that intentional tort is but the natural consequence of its own negligent misadventure. Unless some other reasons exist for treating negligence claims against the Government differently depending on who committed

the assault, the identity of the intentional tortfeasor may not be considered controlling.

The authorities relied upon the Government, *Wine v. United States,* 705 F.2d 366 (10th Cir. 1983); *Naisbitt v. United States,* 611 F.2d 1350 (10th Cir.), cert. denied, 449 U.S. 885 (1980); *United States v. Shively,* 345 F.2d 294, 297 (5th Cir.), cert. denied, 382 U.S. 883 (1965); *Hughes v. United States,* 662 F.2d 219 (4th Cir. 1981), aff'g *Hughes v. Sullivan,* 514 F.Supp. 667 (E.D. VA. 1980) are readily distinguishable. In these cases, plaintiff's claim suffered from three fatal defects. First, the causes of action were directly based on the commission of a deliberate assault and battery and only through conclusory allegations and artful pleading were the litigants able to couch their causes of action in terms of negligence. All are classic, traditional assault and battery actions except for the disingenuous assertion that the Government knew or should have known that the employee had malicious propensities.

Such a conclusory statement, however, is based upon the very assault for which the action is brought. In this case, we are concerned with a servicemember, Heard, who had already committed one brutal homicide, had served time for that crime, and had been recommended for immediate separation from the service as a result of his dangerous propensities. Being fully aware of Heard's violent propensities, the government was under an obligation to take the necessary steps to protect others so that Heard would not kill or injure a second individual. More specifically, the government was under an obligation to see to it that a situation similar to the one which is the basis for this action did not occur.

Secondly, there was, in those cases upon which the government relies, an insufficient factual basis upon which the claimant contended that the Government knew or should have known either of the prior violent action by the assailant or of the assailant's potential violence.

Finally, the Government had not taken any initial steps to remove the employee from its employ. Clearly the causes of action in these cases were directly based on the commission of an intentional tort rather than on the negligence of Government employees separate and apart from intentional and tortious behavior.[5]

B. RESPONDENT'S CLAIM IS NOT BARRED BY THE FERES DOCTRINE.

The FTCA permits a civil action against the United States,

> for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omis-

---

[5] See *Panella,* supra (In this case, . . . , a negligence action is not merely an alternative form of remedy for assault but negligence is rather the essence of plaintiff's claim."); *Liuzzo,* supra ("The mere fact that the injury suffered is directly attributable to an assault or battery does not automatically bar a suit against the Government (citation omitted) . . . It is worthy of emphasis that plaintiffs are not attempting to characterize the actual battery in this case as one negligently performed. Rather, the conduct alleged to have been negligently or wrongfully committed is conduct apart from the murder but which is alleged to have proximately caused the murder".); *Loritts,* supra ("The tort did not arise out of the assault and battery. It had its roots in the Government's negligence".); *Bergman v. United States,* 565 F.Supp. 1353 (W.D. Mich. 1983) ("while plaintiff suffered injury in the nature of an assault, the government's negligence lies in its failure to intercede to protect plaintiff's right to interstate travel and equal protection of the law".)

> sion of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. §§ 1346 (b), 2674.

Although no section of the Act specifically excludes all actions by members of the Military, in a series of decisions now referred to as the *Feres* doctrine, this Court defined an exception to the Act and held that no action lies for injury to a member of the Armed forces whose activity at the time of the injury is "incident to military service". *United States v. Brown,* 348 U.S. 110 (1954); *Feres, supra; Brooks v. United States,* 337 U.S. 49 (1948).[6]

In *Feres,* this Court reasoned that no private person could conscript an army, and therefore the Government could not be liable "to the same extent as a private indi-

---

[6] The Feres doctrine, contrary to the Government's implicit suggestion (Government's Brief at page 26, footnote 7), is not without its critics. In fact, it has been subjected to widespread if not universal criticism. *Hinkie v. United States,* 715 F.2d 96, 97 (3d Cir. 1983) ("Here we are forced once again to decide a case where 'we sense the injustice of the result' "); *Scales v. United States,* 685 F.2d 970, 974 (5th Cir. 1982) (applying *Feres* "reluctantly" and "regret[ting] the effects" of the conclusion); *Hunt v. United States,* 636 F.2d 580, 589 (D.C.Cir. 1980) ("the *Feres* doctrine clearly lives, although its theoretical bases remain subject to serious doubt"); *Veillette v. United States,* 615 F.2d 505, 506 (9th Cir. 1980) (applying *Feres* "reluctantly"); *Peluso v. United States,* 474 F.2d 605, 606 (3d Cir.), *cert. denied,* 414 U.S. 879, 94 S.Ct. 50, 38 L.Ed.2d 124 (1973) ("If the matter were open to us we would be responsive to the appellants' argument that *Feres* should be reconsidered * * *"); Hitch, The Federal Tort Claims Act and Military Personnel, 8 Rutgers L.Rev. 316 (1954); Rhodes, The *Feres* Doctrine After Twenty-Five Years, 18 A.F.L.Rev. 24 (1976); Note, From *Feres* to *Stencel:* Should Military Personnel Have Access to FTCA Recovery?, 77 Mich.L.Rev. 1099 (1979).

vidual." See 28 U.S.C. § 2674 (1976). This Court stated that because the FTCA would subject soldiers to the notorious divergencies in state laws, because it would interfere with the "distinctively federal character" of the relation between soldiers and superiors, and because Congress failed to provide for adjustment between the FTCA and veterans benefits acts, an implied exception to the FTCA for activities "incident to military service" was warranted.

With *Brooks* and *Feres* this Court began drawing the "incident to service" line which determines whether injuries are compensable under the FTCA. In *United States v. Brown,* supra, this Court confirmed that *Feres* had not overruled *Brooks.* In *Brown,* a veteran was allowed to bring a medical malpractice claim under the FTCA. The Court supplied these rationales for the *Feres* doctrine:

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character.

348 U.S. at 112.

In this case the Government contends that respondent's claim brings into play issues of military discipline and invades the special relationship that exists between soldiers and their superiors.

In Note, *The Effect Of The Feres Doctrine On Tort Actions Against The United States By Family Members Of Servicemen,* 50 Fordham L.Rev. 1241, 1264, 1265 (1981-1982) it was said:

Courts should similarly recognize that when members of a serviceman's family bring suit, the effect, if any, on military discipline is insignificant. The spouse and children of a soldier are civilians, they are neither parties to the special relationship that exists between the soldier and his superiors nor are they subject to military orders. For them to assert in a public forum that military officers were negligent is less offensive to the military's system of discipline than it would be for those subject to make the same charge.

. . .

There will always be some interference with the military function when judicial review is granted. Interference alone, however, is not sufficient to bar the claim. Actions brought by civilians or off-duty servicemen for injuries arising from the alleged negligence of military personnel, but independent of any injury to a serviceman, may involve second guessing military orders or require testimony of military officers. Yet, these actions have never been thought to sufficiently threaten military discipline so as to warrant their dismissal. Because the threat to military discipline is similarly tenuous and remote in suits by family members of servicemen, this factor alone is insufficient to warrant their bar.

Similarly, in Myers, *The Feres Doctrine: Has It Treated Remediless Wrongs For Relatives Of Servicemembers?* 44 U. of Pitt.L.Rev. 929, 952 (1983) it was said:

> Rather, this comment contends that within the framework established by the Supreme Court in those cases for determining if a claim falls within the scope of the § 2674 waiver by Congress, the claims of such persons as the Hinkies, the Lombards and the Monacos were valid and enforceable against the United States under that section. Although the Supreme Court held in those cases that injuries are not compensable under the FTCA when they 'arise out of or are in the course of activity incident to service,' it is contended that this phrase ought not to be read as imposing a 'but for' test for determining whether the plaintiff's injuries arose incident to service: viz., would the plaintiff's injury not have occurred but for the active-duty status of the serviceman? As argued earlier, such a test is not consistent with the primary purpose of the FTCA as stated by the Supreme Court and does not comport with the reasoning of the Court's decisions interpreting that statute. Rather, it is contended that the 'incident to service' phrase ought to be read and applied by the courts to include only those injuries and those activities which were incident to service in the sense that the existence of alternative remedies, the threat to military discipline, or the distinctively federal relationship between the government and the claimant are such that, as held by the Supreme Court in *Feres, Brown* and *Stencel,* the Congress would not have intended to include them within the framework of its waiver of sovereign immunity in § 2674. (Footnotes omitted).

A close and careful analysis of the factors cited in *Feres* and its progeny make it abundantly clear that Respondent's claim is not barred.

A. Relationship Between Servicemember's Activity And Military Service.

District and circuit courts have emphasized various factors in determining whether an injury occurred during some activity "incident to service." See Generally 1 L. Jayson, *Handling Federal Tort Claims,* Ch. 5, § 150-155 (1964 & Supp. 1979); Annot., 31 A.L.R. Fed. 146 (1977). The first question usually asked is what was the duty status of the servicemember. The second concern, especially with vehicular collisions, is where the injury oc-

curred. Contrary to what one might expect, inquiry into what function the servicemember was performing appears to be one of the last questions considered. Upon examining the totality of circumstances, the court determines whether the activity was incident to service.

1. Duty Status

If an individual has been discharged from the service, his activities are normally not "incident to service." See *United States v. Brown,* supra; *Watt v. United States,* 246 F.Supp. 386 (E.D.N.Y. 1965). At the other extreme, one who is on active duty and on duty for the day is acting "incident to service." See *Beaucoudray v. United States,* 490 F.2d 86 (5th Cir. 1974). Between these extremes are degrees of active duty status ranging from furlough or leave to mere release from the day's chores. One on furlough or leave, as in *Brooks,* normally has an FTCA action. One with only an unexercised right to a pass or who is only off duty for the day usually is held to be acting "incident to service." e.g. *Feres,* supra; *Zoula v. United States,* 217 F.2d 81 (5th Cir. 1954) (unexercised right to pass).

At the time of Shearer's murder he was off duty, off the military reservation, and on "authorized leave." He was not acting under the compulsion of orders on duty and he was not on a military mission. His injuries were in no significant way a consequence of his use of benefits or services available to him as a member of the military. His status was beyond equation with those in *Mason* or *Watkins,* in which the plaintiffs were merely off duty for the day. *Mason v. United States,* 568 F.2d 1135 (5th Cir. 1978); *Watkins v. United States,* 462 F.Supp. 980, (S.D.

Ga. 1977), aff'd per curiam, 587 F.2d 279 (5th Cir. 1979). No nexus may be drawn that would allow Shearer's death to be characterized as incident to service. His exercised right to be absent from his duties, his unit, and the military establishment immunizes his claim from the Government's assertion that *Feres* bars relief.[7]

2. Place of Injury

Causes of action by servicemembers under the FTCA have been permitted if the soldier is not on the military reservation at the time or injury or death. *Brooks v. United States,* supra. Respondent's decedent was stationed at Fort Bliss, Texas. He was murdered, however, in Otero County, New Mexico, a location divorced from the military reservation with no nexus to Fort Bliss.

---

[7] *Harten v. Coons,* 502 F.2d 1363 (10th Cir. 1974), cert. denied, 420 U.S. 963 (1974) ("[I]f a claimant is on leave or in inactive status at the time and the injury is not the product of a military relationship suit under the [FTCA] may be allowed."); *Mills v. Tucker,* 499 F.2d 886 (9th Cir. 1974) (Suit by servicemember returning to base from furlough not barred by Feres); *Miliken v. United States,* 439 F.Supp. 290 (D.C. Kan. 1976) (Suit by servicemember for beatings by law enforcement officers while servicemember was confined by Military not barred by *Feres*); *Bryson v. United States,* 463 F.Supp. 908 (E.D. Pa. 1978) (suit by servicemember killed in a brawl on a weekend pass or leave not barred by *Feres); Johnson v. United States,* 704 F.2d 1431 (9th Cir. 1983) (Suit by servicemember injured while leaving his job as a bartender at the NCO Club on the base not barred by *Feres).* See also *Knecht v. United States,* 144 F.Supp. 786, 789 (E.D. Pa. 1956), aff'd 242 F.2d 929 (3d Cir. 1957) (pass permitting servicemember to be absent from 5:00 P.M., until 8:00 P.M., the following day); *Barnes v. United States,* 103 F.Supp. 51 (W.D. Ky. 1952) (pass to return home); *Rich v. United States,* 144 F.Supp. 791 (E.D. Pa. 1956) (weekend pass); *Hand v. United States,* 260 F.Supp. 38 (M.D. Ga.) (24-hour pass); *Sapp v. United States,* 153 F.Supp. 496 (W.D. La. 1957) (pass to return home).

3. Activity

A relevant inquiry attaching to all wrongful death claims of servicemembers is what Shearer was doing at the time he was murdered. Shearer was not subject to military control; he was not under the compulsion of military orders; he was not performing any military mission. Nor was he attending to personal affairs, such as shopping or engaging in activities arising from life on the base in the manner of recreational activities. Rather, he was enjoying some free time out of uniform and away from the military setting when he was kidnapped by Heard and driven, against his will, to a location in another state where he was executed. Keeping in mind that "incident" does not mean that a strict "but for" test applies, Shearer should not be considered to have been engaged in activity incident to service. *Parker v. United States.*[8]

4. Incident to Service

As the Court of Appeals appropriately concluded: "Although receiving medical treatment in military hospitals may be considered an activity and benefit incident to military service and therefore barred under Feres, cer-

---

[8] *Parker v. United States,* 611 F.2d 1007 (5th Cir. 1980) (servicemember driving through military on his way home off the reservation on a four day pass); *Zoula v. United States,* supra (Servicemember was attending to personal business during off duty hours); *Stephan v. United States,* 490 F.Supp. 323 (D.C. Mich. 1980) (servicemember injured while attending party on military reservation); *Bryson,* supra (recovery permissible because serviceman was not acting under compulsion of orders or duty and he was not on a military mission); *Knecht v. United States,* 144 F.Supp. 786, 789 (E.D. Pa. 1956) (recovery allowed when serviceman's "activities were not controlled by his military status"), aff'd 242 F.2d 929 (3d Cir. 1957).

tainly being kidnapped off base at gun point can never be perceived as one of the activities or anticipated free benefits of being in the Armed services. Thus, there is no legitimate basis on which Feres can bar [Shearer's] claim." 723 F.2d 1106.[9]

B. Maintenance of Discipline

The rationale now apparently regarded by this Court as the main justification for its holding in *Feres* (see *Chappel v. Wallace,* — U.S. —, 103 S.Ct. 2362, 2365 (1983), is the possible harmful effect on military discipline and the effectiveness of allowing suit of the nature involved herein. The critical question is whether the servicemember instantly was performing duties of such a character as to undermine traditional concepts of military discipline if his

---

[9] See *Harten v. Coons,* supra (If a claimant is on leave or inactive status at the time and the injury is not the product of a military relationship suit under the Act may be allowed); *Woodside v. United States,* 606 F.2d at 141, 142 ("Feres requires that there be some proximate relationship between the service member's activities and the Armed Forces . . . [W]here the soldier demonstrates that the activity has no significant link to the Armed Forces and is remote to his military service, suit under the Act has been allowed".); *Camassar v. United States,* 400 F.Supp. 894, 897 (D. Conn. 1975) ("the more realistically critical test of whether Feres should apply is the existence or absence of meaningful causal connection between the injury occurrence and the injured person's military service") aff'd, 531 F.2d 1149 (2d Cir. 1976); *Schwager v. United States,* 279 F.Supp. 262, 263 (E.D. Pa. 1968) (application of Feres depends on the "relevant links" between the military and the servicemember's activity and requires "a measuring of the degree to which the activity is divorced from or related to military service"); *Downes v. United States,* 249 F.Supp. at 628 (Feres should only be applied when the servicemember is "performing duties of such a character" so that a civil suit would "undermine the traditional concepts of military discipline").

estate was permitted to maintain a civil suit for his wrongful death. *Parker v. United States,* supra. More specifically, the focus of the inquiry is whether the servicemember's activities at the time of injury are of a sort that could harm the disciplinary system if litigated in a civil action. *Cruz v. United States,* 715 F.2d 463 (9th Cir. 1983).

As this Court has stated, courts must not allow suits by soldiers to "disrupt[] . . .' [t]he peculiar and special relationship of the soldier to his superiors' that might result if the soldier were allowed to haul his superiors into court. *Stencel Areo Engineering Corporation v. United States,* 431 U.S. 666, 676 (1977) (Marshall, J., dissenting), quoted in *Chappell v. Wallace,* supra.

The mere fact that the judgment of military officers may be questioned in a court of law is not, however, sufficient ground for invocation of Feres, although, it may bring other bars to suit contained in the FTCA into play. Were this not so, civilians could never sue the United States for injuries resulting from military negligence. In such suits, courts grant the civilian's claims without even discussing the effects of the suit on military discipline. *See, e.g., Bridgford v. United States,* 550 F.2d 978 (4th Cir. 1977); *Williams v. United States,* 435 F.2d 804 (1st Cir. 1970); *Arrendale v. United States,* 469 F.Supp. 883 (N.D.Tex. 1979); *Steele v. United States,* 463 F.Supp. 321 (D.Alaska 1978). The fact that an officer might refrain from giving an order to the soldier because a civilian might ultimately sue the United States is so ephemeral and far-fetched that it is given no weight at all in determining the limits of *Feres.*

The rule of law sought by the Government would effectively preclude actions against the government by serv-

icemen and their survivors merely because decision making is called into question. This cannot be what this Court intended in *Feres.* Decisions which are essentially military in nature should never be called into question. *Gilligan v. Morgan,* 413 U.S. 1 (1973). Decisions, however, which are of a kind made by the general public and not characteristically military in nature are open to inquiry as long as its effect on military discipline is minimal. *West v. United States,* 729 F.2d 1120 (7th Cir. 1984).[10] And it is worthy of note that the military discipline factor is not an absolute. The civilian courts may inquire into military actions which have injured civilians even if the Courts might in some degree have to "second guess" military decisions or require members of the armed forces to testify about their decisions and actions. Cf. *Stencel Aero,* supra. The fact that a claim might involve some inquiry into military activities is not, without more, a reason for barring the plaintiff's claims.[11]

---

[10] See also *Broudy v. United States,* 661 F.2d 125, 128-129 (9th Cir. 1981); *Everett v. United States,* 492 F.Supp. 318, 325-326 (S.D. Ohio 1980); *Thornwell v. United States,* 471 F.Supp. 344 (D.C. 1979); *Schwartz v. United States,* 230 F.Supp. 536 (E.D. Pa. 1964), all cases in which the negligence of Armed Services personnel as a predicate for recovery was successfully asserted, involving as they did, minimal, if any, intrusion into military affairs.

[11] There is a fine line between the inquiry into military activities and the discretionary function exception, § 2680(a) of the FTCA, so frequently interposed by the Government in defending FTCA suits. Where the allegedly tortious conduct involves policy considerations or judgment regarding the nature and scope of a regulatory scheme, such conduct is immunized from judicial review by virtue of the discretionary function exception; however, where the allegedly tortious conduct involves the execution, implementation or performance of established policies or procedures, a claim will lie under the

(Continued on following page)

In *West v. United States,* supra, children of a former serviceman were permitted to bring an action against the

---

(Continued from previous page)

FTCA. In this matter, respondent's claim is based on the military's failure to follow established policy. Under such circumstances, respondent's claim cannot be barred. See *Rulli v. United States,* 581 F.Supp. 1502 (1984) (FAA negligently omitted or performed inspection of navigational aids at airport where professional or scientific rather than policy-oriented judgment made at operational and not planning level); *Downs v. United States,* 522 F.2d 990 (6th Cir. 1975) (Government liable for FBI agent's negligent handling of airplane hijacking in that the agent failed to follow well-defined procedures for handling hijackers); *White v. United States,* 317 F.2d 13, 14 (4th Cir. 1963) ("The application . . . of policy to the individual case is an administrative decision at the operational level which if negligently done will make the Government liable . . ."); *Bryson v. United States,* 463 F.Supp. 908 (E.D. Pa. 1978) ("However, to the extent that plaintiff alleges that the specific decision to admit [a serviceman] and/or subsequent failure to remove him constituted negligent conduct by the United States, this court has jurisdiction to consider her complaint); *Gibson v. United States,* supra ("The application of . . . policy to the individual case is an administrative decision at the operational level which if negligently done will make the Government liable . . ."); *Johnson v. United States,* supra ("[Claimant's] activities do not involve the sort of close military judgment calls that the Feres doctrine was designed to insulate from judicial review. See supra at 1439. We are not dealing with a case where the government's negligence occurred because of a decision requiring military expertise or judgment. Rather, the government is negligent precisely because it failed to follow established military rules and procedures governing the operation of the NCO Club"). Respondent does not challenge military decisions of general application or the specific way in which a serviceman's superior officers have discharged their responsibilities to him. (Government's Brief at page 24). Respondent attacks not the formulation of standards to judge the fitness of applicants to the military forces of this country, nor the standards governing the retention of service members in the military, but the specific failure to remove Andrew Heard from active duty using existing procedural remedies available to it duing the almost

(Continued on following page)

Government for birth defects which allegedly occurred as a result of the government's negligent typing of a serviceman's blood at his induction. The Court in permitting the action to proceed stated:

> We believe that the threat to military discipline in this case is minimal. The plaintiffs are not asking the court to inquire into activities which are distinctively military in nature. They are alleging only that government personnel negligently mistyped Stanley's blood. These allegations in no way implicate distinctively military activity; blood typing presumably occurs generally in hospitals and clinics—wherever transfusions can be given. And it is difficult to imagine how an inquiry into the Army's performance of a simple, straight-forward laboratory procedure or perhaps the imprinting of dog tags could threaten the military relationships which are the primary focus of the *Feres* doctrine.
>
> • • •
>
> By contrast, this case involves only an inquiry into a routine medical test which happened to be performed by Army medical personnel. The case seems to present no threat at all to military discipline. There

---

(Continued from previous page)

three years that Heard served in prison for bludgeoning a German woman to death while on active duty in that country, or during the better than four months following Heard's release from prison when he was continued as a member of the active Army before taking Shearer's life. The Eighth Circuit's recent decision in *Brown v. United States,* 739 F.2d 362 (1984), petition for cert. pending No. 84-636, lends no support to the Government's position (Government Brief at page 27 footnote 9). Brown's claims that his supervisors were negligent in failing to prevent the incident of racial assault and in failing to perform a proper investigation of the incident are unlike the claims made by respondent. Brown specifically called into question military authority and policy and not merely the application of military policy to a specific case. *Gibson v. United States,* supra; *Bryson v. United States,* supra.

is nothing of distinctive military character in a test of blood type or the communication of its results. The court will not have to inquire into the "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force," *Gilligan v. Morgan,* 413 U.S. 1, 10, 93 S.Ct. 2440, 2445, 37 L.Ed.2d 407 (1973), nor will an inquiry into the blood mistyping undermine the "special nature of military life" or "the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel," *Chappell v. Wallace supra,* — U.S. at —, 103 S.Ct. at 2367. See also *Kohn v. U.S.,* supra; *Parker v. U.S.,* supra; *Mills v. Tucker,* supra; *Knecht v. U.S.,* supra.

As stated, respondent's claim focuses on the negligence of the Government in its failure to discharge, supervise, or warn about Heard. Before Shearer had ever enlisted in the Army Heard had been convicted of manslaughter in Germany, had been incarcerated for better than 28 months, and had been the subject of repeated recommendations for involuntary discharge (See J.A. 9-12). Once released from prison Heard performed in an active duty role with the Army first at Ft. Dix, New Jersey, and then at Ft. Bliss, Texas. Negligent failures on the part of the Army to discharge, supervise, or warn about Heard occurred at both United States posts and took place before Shearer was ever assigned, after Heard, to Ft. Bliss. It is straining at best for the Government to attempt, under these circumstances, to characterize either its own negligent acts or Shearer's status when murdered as "incident to service." The "incident to service" test is to be applied to Shearer, not Heard, in deciding if suit is precluded. There is no nexus born of a military relationship between Shearer and either the Government's negligence

in this case or those events that occasioned Shearer's death sufficient to bar the instant claim.

C. Distinctively Federal Character

The "distinctively federal character" of the soldier-Government relation was mentioned in *Feres,* citing *United States v. Standard Oil Company,* 332 U.S. 301 (1947). By this phrase, this court apparently means that a soldier's recovery and the Government's liability should not depend upon the happenstance of where the injury occurs. See *Stencel Aero Engineering Corporation v. United States,* supra. Under the FTCA, the law of the state of the injury governs. 28 U.S.C. § 1346(b)(1976). This court also noted that soldiers have no choice over where the Government sends them. Injured members of the military would be involuntarily subjected to variations in state laws. We learn from *Brooks* and *Brown,* however, that some FTCA suits are possible. Congress had determined that for FTCA suits, uniformity is unnecessary. Furthermore, Congress has not totally left soldiers at the mercy of state tort law; veterans' benefits are available. While the federal character of the relationship may be relevant to the wisdom of adopting an exception for service members, it does not help define when an injury is incurred "incident to service" and should not act to bar respondent's claim in this matter.

D. Veteran's Benefits

In *Stencel Aero Engineering Corporation v. United States,* supra, a national guard pilot was injured when the egress life support system on his military aircraft malfunctioned during a flight. The pilot sued the manufac-

turer of the life-support system and the United States. The manufacturer, Stencel, cross-claimed against the United States for indemnity. This Court dismissed Stencel's cross-claim against the United States on the basis of the Feres doctrine. In so holding, the Court ruled that the Veteran's Benefit Act adequately protected injured servicemen. Said the Court:

> A compensation scheme such as the Veteran's Benefits Act serves a dual purpose; it not only provides a swift, efficient remedy for the injured serviceman, but it also clothes the Government in "protective mantle of the Act's limitation-of-liability provisions." See Cooper Stevedoring Company v. Kopke, Inc., 417 U.S. 106 115, 40 L.Ed. 2d 694, 94 S.Ct. 2174 (1974). Given the broad exposure of the Government, and the great variability in the potentially applicable tort law, see Feres, 340 U.S., at 142-143, 95 L.Ed. 152, 71 S.Ct. 153, the military compensation scheme provides an upper limit to liability for the Government *as to service connected injuries* (emphasis added).

Respondent readily concedes that the Veteran's Benefits Act provides an exclusive remedy for suits against the Government by active duty servicemen based on injuries incurred while on duty, *Parker v. United States,* supra (serviceman killed while on leave: "The compensation system does not exclude FTCA remedies, but it is rather the sole remedy once it is determined the injury is *service-connected*") (emphasis added).

Instantly, and as previously set forth, it cannot be accurately asserted that the murder of Vernon Shearer was a "service connected injury", that is, arising out of or in the course of activity incident to service. In *Parker v. United States,* supra, the Court stated:

> The Parker family's receipt of veteran's benefits does not foreclose an FTCA cause of action. Parker had received the right to be off-duty for four days; he was driving a civilian vehicle towards his home off the military reservation; he was not performing any military function. His activities were not "incident to service," and the Government should be liable like any other private person.

Thus, merely because a compensation scheme exists which covers injury or death which is service related, it does not foreclose this action where death was not service related.

CONCLUSION

The Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

WILLIAM T. CANNON, ESQUIRE
Suite 1500, Robinson Building
42 South 15th Street
Philadelphia, PA 19102
(215) 564-4448

Attorney for Respondent

JANUARY 1985

Office-Supreme Court, U.S.
FILED
FEB 19 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-194

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Chappell v. *Wallace*, 462 U.S. 296 5

Feres v. *United States*, 340 U.S. 135 ..... 4, 5, 6

Flood v. *Kuhn*, 407 U.S. 258 3

Hinkie v. *United States*, 715 F.2d 96, cert. denied, No. 83-809 (Feb. 21, 1984) 6

Laswell v. *Brown*, 683 F.2d 261, cert. denied, 459 U.S. 1210 6

Lombard v. *United States*, 690 F.2d 215, cert. denied, 462 U.S. 1118 6

Monaco v. *United States*, 661 F.2d 129, cert. denied, 456 U.S. 989 6

Mondelli v. *United States*, 711 F.2d 567, cert. denied, No. 83-632 (Feb. 21, 1984) 6

Panella v. *United States*, 216 F.2d 622 ..... 1, 2

Scales v. *United States*, 685 F.2d 970, cert. denied, 460 U.S. 1082 6

Sheehan v. *United States*, 713 F.2d 1097, cert. denied, No. 83-6233 (May 14, 1984) 6

Stencel Aero Engineering Corp. v. *United States*, 431 U.S. 666 ..... 4, 5, 6

United States v. *Brown*, 348 U.S. 110 3

Page

Cases—Continued:

United States v. *Muniz*, 374 U.S. 150 3

West v. *United States*, 729 F.2d 1120 vacated, 744 F.2d 1317, petition for cert. pending, No. 84-1083 5

Statute:

Pub. L. No. 98-525, § 1631, 98 Stat. 2646 3

Miscellaneous:

H.R. 1942, 98th Cong., 1st Sess. (1983) 4

H.R. Rep. 98-124, 98th Cong., 1st Sess. (1983) 4

Litigation Relating to Atomic Testing: Hearing on H.R. 2797 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 98th Cong., 1st Sess. (1983) 3

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-194

UNITED STATES OF AMERICA, PETITIONER

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

---

1. Respondent's argument that her claim is not barred by the intentional tort exception consists principally of reiterating that her claim alleges negligence by government employees (see Resp. Br. 10-11) — specifically, by the military superiors of Heard and Shearer — and of citing (Resp. Br. 15-20) several cases that follow *Panella* v. *United States*, 216 F.2d 622 (2d Cir. 1954), in ruling that the government can be held liable under the FTCA for injuries inflicted by the intentional tort of a non-employee who is under the government's supervision. As we explained in our opening brief (at 9-10), respondent cannot avoid the intentional tort exception merely by framing a claim that sounds in negligence; the intentional tort exception does not simply bar claims *for* assault and battery but rather precludes all claims "arising out of" assault or battery. Unless this choice of words is to be accorded no significance, respondent's

claim must be barred. We also explained in our opening brief (at 22-24) why the *Panella* line of cases does not aid respondent.

2. In her unsuccessful attempt to avoid the intentional tort exception, respondent repeatedly emphasizes that her "claim is not based on Heard's * * * murder of Shearer, but is premised on the military's negligent acts" of failing to discharge Heard, to "control" Heard, or to warn other servicemen about Heard. Resp. Br. 10; see, *e.g., id.* at 6-7, 10-11, 21; *id.* at 12 ("[R]espondent's cause of action does not arise out of Heard's killing of Shearer, but from the military's negligent failure to rid itself of or to warn of the menace Heard posed to other service members."). But when respondent attempts to explain why her claim is not barred by *Feres,* she shifts ground and treats her claim as if it *were* "based on Heard's murder of Shearer"; she emphasizes Shearer's location, duty status, and activity at the time he was killed by Heard. See Resp. Br. 28-31.

As we explained in our opening brief (at 30-31), these factors are irrelevant, because we do not assert, and need not assert, that Heard's tort was incident to Shearer's military service; Heard was unquestionably acting outside the scope of his employment when he killed Shearer, and respondent accordingly does not even attempt to hold the government directly liable for Heard's action. The only torts alleged in respondent's complaint that were even arguably committed by government employees acting within the scope of their employment were the decisions made by Shearer's and Heard's superiors with respect to the discharge, control, and discipline of Heard. These government decisions were not made while Shearer was off duty or off the base; they were decisions made by military officials in the exercise of their responsibility to manage the composition of their forces and relationships among servicemen,

including Shearer. These decisions were, therefore, clearly incident to Shearer's military service.

Respondent makes unmistakably clear in her brief (*e.g.,* at 10) that her claim is that Shearer's military superiors breached a duty they owe to servicemen to exercise due care in protecting them — by warnings and the appropriate use of discipline — against other servicemen who may be prone to acts of violence. This duty and the extent to which it is faithfully discharged in any particular instance are obviously integral aspects of "the 'peculiar and special relationship of the soldier to his superiors' " (*United States* v. *Muniz,* 374 U.S, 150, 162 (1963), quoting *United States* v. *Brown,* 348 U.S. 110, 112 (1954)). The purpose of the *Feres* doctrine is precisely to prevent courts from inquiring into, and attempting to supervise, that relationship in the guise of adjudicating tort claims.[1]

---

[1]Although respondent asserts (Br. 24 n.6) that the *Feres* doctrine has been widely criticized by commentators, she does not note the evidence — some of which is mentioned in our opening brief (at 26 n.7) — that Congress is aware of the 35-year old *Feres* doctrine and has deliberately chosen not to overrule it. See *Flood* v. *Kuhn,* 407 U.S. 258, 283-284 (1972). For example, Congress in its most recent session enacted Section 1631 of Pub. L. No. 98-525, 98 Stat. 2646, which provides that an individual injured "due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States" can bring suit against the government under the FTCA. The language that became Section 1631 was proposed by a representative of the Department of Justice, who advised the subcommittee considering the proposed legislation that it would incorporate the *Feres* doctrine and answered questions from subcommittee members about that aspect of the proposed legislation. *Litigation Relating to Atomic Testing: Hearing on H.R. 2797 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary,* 98th Cong., 1st Sess. 20-38 (1983) (testimony of Deputy Assistant Attorney General B. Wayne Vance). In addition, a congressional committee recommended against the adoption of another version of this legislation partly on the ground

Respondent further suggests that *Feres* does not bar her claim because she is challenging not the formulation of military policy but its application in particular circumstances. See Resp. Br. 7-8, 33-34 n.11.[2] But both decisions in which this Court ruled that the *Feres* doctrine barred a suit under the Federal Tort Claims Act — *Feres* itself and *Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. 666 (1977) —involved actions by the military that cannot be characterized as the formulation of military policy. The military actions involved in *Feres* and the cases decided with it were medical malpractice and the "quartering [of a serviceman] in barracks known or which should have been known to be unsafe because of a defective heating plant, and in failing to maintain an adequate fire watch" (340 U.S. at 137); in *Stencel Aero* the allegation was that the government provided "faulty specifications, requirements, and components" to the manufacturer of military equipment

---

that it "may be grossly unfair to both current and potential plaintiffs" because, among other things, it would incorporate "the doctine established in *Feres* v. *United States,* 340 U.S. 135 (1950) * * * prohibit[ing] suits by veterans for torts arising while they were on active duty." H.R. Rep. 98-124, 98th Cong., 1st Sess. 4-5 (1983). Thus, Congress was clearly aware that the *Feres* doctrine is a limit on the FTCA remedy, but it chose to extend that remedy to a new category of cases nonetheless.

In addition, Congress recently refused to enact a bill that would have to amended the FTCA to abolish the *Feres* defense with respect to claims "aris[ing] out of medical or dental care furnished * * * in a Department of Defense hospital." H.R. 1942, 98th Cong., 1st Sess. (1983).

[2]Respondent's statement of this position is not always internally consistent; for example, respondent asserts that she "seeks not to second-guess the decisions of superior officers, but merely [to] review * * * [the] failure to remove Heard from the Service" (Resp. Br. 7-8) — a decision made by superior officers. See also Resp. Br. 34 n.11 ("Respondent does not challenge * * * the specific way in which a serviceman's superior officers have discharged their responsibilities to him * * * but [does challenge] the specific failure to remove Andrew Heard from active duty".).

that malfunctioned and injured a serviceman (431 U.S. at 668). Moreover, it is apparent that there are many instances in which *Feres* should preclude claims that involve a challenge not to the formulation of military policy but to its implementation; for example, if a serviceman sued under the FTCA claiming that a routine training exercise was carried out in an excessively rigorous or hazardous fashion by his drill sergeant, his claim would unquestionably be barred by *Feres.* See generally *Chappell* v. *Wallace,* 462 U.S. 296 (1983).[3]

Finally, respondent suggests (Resp. Br. 36) that her claim should not be barred because Shearer had not enlisted at the time some of the alleged negligent acts occurred. But if a serviceman alleges an injury that arises out of or is incident to military service, his claim is barred by *Feres* irrespective of whether he enlisted before or after the government actions that initiated the causal chain leading to his injury. See U.S. Br. 31 nn.11, 12 (citing cases). In *Stencel Aero,* for example, the Court did not inquire into whether the government's alleged negligence occurred before or after the injured serviceman enlisted, even though it might well have occurred prior to enlistment. The damage that the *Feres* doctrine is intended to prevent is equally threatened whether or not the injured serviceman has actually enlisted at the time of the alleged negligent act: an officer's willingness to act decisively will be affected — and the "peculiar and special relationship of the soldier to his superiors" will therefore be disrupted — whenever the officer has grounds for concern that a serviceman who will be affected by his

---

[3]Respondent relies heavily on the panel decision in *West* v. *Urited States,* 729 F.2d 1120 (7th Cir. 1984), which reversed the district court decision in that case. See Resp. Br. 33-36. But the panel decision was vacated by the en banc court of appeals, which then affirmed the district court by an equally divided vote. 744 F.2d 1317 (1984), petition for cert. pending, No. 84-1083 (filed Dec. 31, 1983).

action will be able to bring suit; it will not matter to the officer whether the potential serviceman has enlisted at the time of the action or enlists subsequently and is affected by the officer's decision at that time. In addition, the *Feres* doctrine is designed to avoid "litigation * * * [in which the] issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety" and "trial[s that] would * * * involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions" (*Stencel Aero Engineering Corp.*, 431 U.S. at 673). Such litigation will occur whenever suit is brought on behalf of a serviceman for injuries sustained incident to military service; it is immaterial whether the serviceman enlisted before or after the military decision that is under review.[4]

---

[4]Respondent also appears to suggest (Br. 26) that her suit should be allowed even though it is brought on behalf of a serviceman, because respondent herself is not enlisted in the Armed Forces. As we noted in our opening brief (at 26 n.8), this argument is foreclosed by *Feres* itself. It is also inconsistent with *Stencel Aero Engineering Corp.*, 431 U.S. at 673: "[I]t seems quite clear that where the case concerns the injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party." The lower courts have also consistently rejected the contention respondent now makes. See, *e.g.*, *Hinkie* v. *United States*, 715 F.2d 96 (3d Cir. 1983), cert. denied, No. 83-809 (Feb. 21, 1984); *Sheehan* v. *United States*, 713 F.2d 1097 (5th Cir. 1983), cert. denied, No. 83-6233 (May 14, 1984); *Mondelli* v. *United States*, 711 F.2d 567 (3d Cir. 1983), cert. denied, No. 83-632 (Feb. 21, 1984); *Lombard* v. *United States*, 690 F.2d 215 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983); *Scales* v. *United States*, 685 F.2d 970 (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983)); *Laswell* v. *Brown*, 683 F.2d 261 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983); *Monaco* v. *United States*, 661 F.2d 129, 133-134 (9th Cir 1981), cert. denied, 456 U.S. 989 (1982). See also Pet. App. 25a n.1 (citing cases).

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

FEBRUARY 1985